

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919

No. 81

LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION
COMPANY, PETITIONER.

BROOKLYN EASTERN DISTRICT TERMINAL.

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT.

FORWARD THE RECORD TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SECOND CIRCUIT.

(12-11)

(26,431)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

No. 406.

LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION COMPANY, PETITIONER,

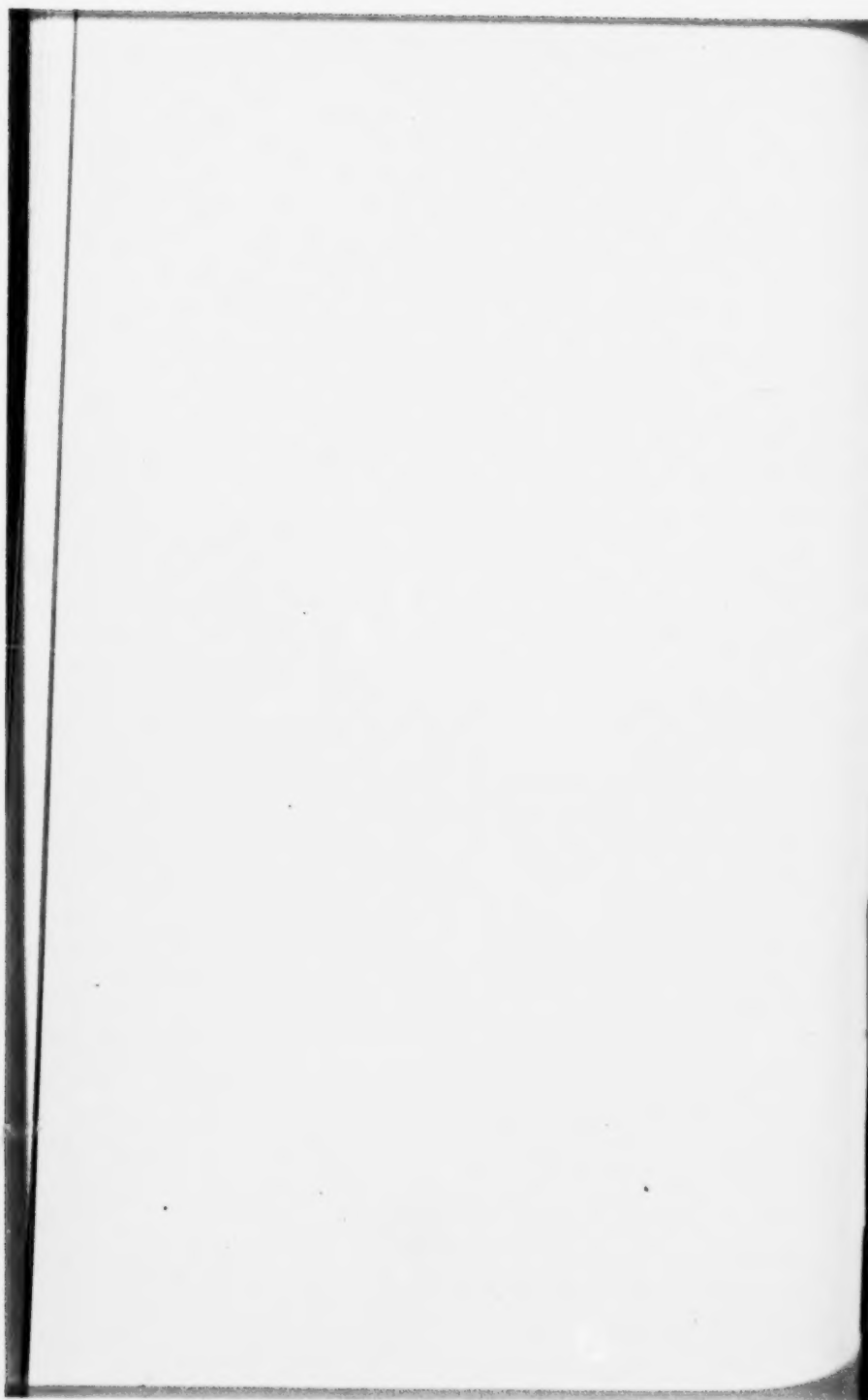
vs.

BROOKLYN EASTERN DISTRICT TERMINAL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT.

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Original

United States Circuit Court of Appeals for the second Circuit.

LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION COMPANY,
LIMITED, Libellant-Appellant,

against

BROOKLYN EASTERN DISTRICT TERMINAL, Respondent-Appellee.

TRANSCRIPT OF RECORD.

Appeal from the District Court of the United States for the Southern
District of New York.

Office Supreme Court U. S. Filed Apr. 13, 1918. James D. Maher,
Clerk.

1 United States District Court, Southern District of New York.

LIVERPOOL, BRAZIL AND RIVER PLATE STEAM NAVIGATION Company,
Libellant,

against

BROOKLYN EASTERN DISTRICT TERMINAL Company, Respondent.

Statement.

July	13, 1914.	Libel of Liverpool, Brazil & River Plate Steam Navigation Company filed.
August	1, 1914.	Answer filed by respondent, Brooklyn Eastern District Terminal.
December	8, 1914.	Exceptions to answer filed.
January	15, 1915.	Exceptions argued before Hon. Augustus N. Hand, D. J.
Feb.	10, 1915.	Opinion of Court filed overruling exceptions to answer.
Feb.	25, 1915.	Trial before Hon. C. M. Hough, D. J.
March	30, 1915.	Order entered overruling exceptions to answer.
August	13, 1917.	Final decree entered.
August	24, 1917.	Notice of appeal and assignment of errors filed.

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Libel.

To the Honorable the Judges of the United States District Court for
the Southern District of New York:

The libel of the Liverpool, Brazil & River Plate Steam Navigation
Company, Limited, owner of the steamship Vauban, against the

Brooklyn Eastern District Terminal, in a cause of collision, civil and maritime, alleges as follows:

First. The libellant is a British corporation and owner of the steamship Vauban which was until the collision hereinafter mentioned, in all respects tight, staunch, strong and seaworthy and properly manned and equipped. The Vauban is a steel twin screw steamer of 10,400 tons gross, 6,537 net, 495 feet long, 60 feet beam, and 28 feet depth of hold.

Second. Upon information and belief that the respondent, Brooklyn Eastern District Terminal, is a New York corporation with office at 129 Front Street, Borough of Manhattan, New York City, engaged in the transportation business in and about the harbor of New York and owner of the steamtugs Intrepid and Industry and the carfloat Brooklyn Eastern District Terminal No. 2.

Third. On or about April 29, 1914, said steamship Vauban was lying moored at the southerly side of Pier 8, Brooklyn, bow in, with her stern about 15 feet inside the end of the pier. The tide was flood, wind light from the east and weather clear.

About 11:45 A. M. on said day the Brooklyn Eastern District Terminal carfloat No. 2 made fast alongside the steamtugs Industry and Intrepid, in proceeding up the East River, negligently came into collision with the stern of the S. S. Vauban, damaging the Steamer's stern, her steering gear, stern post and rudder.

Fourth. Said collision and damage were not due to any negligence on the part of the libellant, its agents or servants, but were due solely to the negligence of the respondent, its agents and servants in charge of the carfloat No. 2 and the tugs Intrepid and Industry, in the following respects, among others:

1. In that said carfloat and tugs were not under the command of a competent person.
2. In that they did not keep a proper lookout.
3. In that they proceeded at a too high and dangerous rate of speed.
4. In that they proceeded too close to the steamship Vauban.
5. In that they did not sooner reverse their engines.
6. In that they did not avoid the Vauban, which was a moored vessel.
7. In that they did nothing to avoid a collision.
8. In that said steamtugs did not starboard their helms and kept out of the way of the Vauban.

Fifth. By reason of the premises, libellant has sustained damages for repairs, loss of time and services of said steamship in the sum of \$35,000, no part of which sum has been paid, although payment thereof has been duly demanded.

Sixth. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of the Honorable Court.

Wherefore, Libellant prays that a citation issue according to the rules and practice of this Court in causes of admiralty and maritime jurisdiction against the Brooklyn Eastern District Terminal citing it to appear and answer all and singular the matters aforesaid and that

this Court will pronounce a decree against the respondent, Brooklyn Eastern District Terminal, in favor of your libellant, with interest and costs, and that your libellant may have such other and further relief as it may be entitled to receive.

BURLINGHAM, MONTGOMERY &
BEECHER,

Proctors for Libellant.

27 William Street, New York City.

SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, ss

Fred T. Busk, being duly sworn, says that he is a member of the firm of Busk & Daniels, the agents in New York of the libellant herein; that he has read the foregoing libel and believes the same to be true; that the libellant is a British corporation and has no officer now within the United States of America; that deponent's knowledge of the facts in the foregoing libel is derived from an examination of the statements of the officers and crew of the steamship Vauban and other witnesses of the collision.

FRED T. BUSK.

Sworn to before me this 13th day of May, 1914.

[SEAL.]

CHAUNCEY I. CLARK,
Notary Public, Kings County.

Certificate filed in New York County.

Answer.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The Answer of Brooklyn Eastern District Terminal to the libel of the Liverpool, Brazil & River Plate Steam Navigation Company, Limited, owner of the steamship Vauban, against the Brooklyn Eastern District Terminal, in a cause of collision, civil and maritime, alleges and propounds as follows:

I. The respondent has no knowledge or information relative to the truth of the matters alleged in the First article of said libel and, therefore, requests the introduction of proof in support thereof by the libellant, if necessary.

II. Respondent admits the allegations contained in the Second article of said libel.

III. Upon information and belief respondent admits that on April 29th, 1914, the steamship Vauban was lying moored at the southerly side of Pier 8, Brooklyn, bow in with her stern about 15 feet inside the end of the pier. The tide was flood, wind light from the east and weather clear. Likewise, respondent admits that at about 11.40 A. M. on said day a collision occurred between a carfloat in tow of the steamtug Intrepid, while proceeding up the

East River, in consequence of which the steamship Vauban received damage about her stern, as alleged in the Third article of said libel but denies each and every other allegation contained therein.

IV. In reply to the Fourth article of said libel the respondent alleges that said collision and damage was produced by the negligence of the agents and servants of the respondent in charge of the steamship Intrepid, as more fully set out in Article VII of this, the respondent answers, and denies every other allegation in said article.

V. The respondent has no knowledge or information relative to the truth of the matters alleged in the Fifth article of said libel and therefore, demands proof in support thereof.

VI. Respondent admits the jurisdiction of this Honorable Court as alleged in the Sixth article of said libel but denies that all and singular the premises are true as alleged therein except as hereinbefore specifically admitted.

Further answering, upon information and belief, respondent alleges:

VII. That it is a corporation organized and existing under and pursuant to the laws of the State of New York, with offices at No. 129 Front Street, Borough of Manhattan, New York City, and a competent crew and had been engaged in kinds of merchandise, mostly cars transported upon carfloats which are propelled by steamtugs. That at about 11 A. M. April 29th, 1914, the steamtug Intrepid left Jersey City, having in tow upon her port side the Brooklyn Eastern District Terminal float No. 2. There were 19 loaded cars on the float. Upon the starboard side of the Intrepid was the steamtug Industri which had been undergoing repairs and was without steam, and which was in tow of the Intrepid, bound for Williamsburgh. The steamtug Intrepid was in charge of experienced navigators and a competent crew and had been engaged in the towage of carfloats in and about the harbor of New York for a long period, and her officers and crew were familiar with the method and ways of handling such towage. While proceeding up the East River upon the right hand side of the channel near the Brooklyn shore, and when about opposite the United Fruit Company's pier there was a fruit steamer which had backed out of her pier and was turning around preliminary to departure for sea. Above the United Fruit steamship, upon the Manhattan side of her, was a steamtug with carfloats. Directly ahead of the Intrepid and her tow was a steamtug with a tow approaching the Intrepid. A signal of one whistle was exchanged between the Intrepid and the approaching tug and thereupon the helm of the Intrepid was put to port, shaping her course nearer the Brooklyn piers. While thus proceeding about off Pier 9, on account of the bow of the carfloat being in slack water and the stern of the tug and tow being in the flood tide, the tug and tow sheered to starboard; in order to break the sheer the engines of the Intrepid were reversed, the starboard corner of the carfloat coming in slight contact with the stern of the steamship Vauban, which was lying moored upon the southern side of Pier 8, resulting in no injury to the bow of the carfloat and producing, it was presumed at the time, little or no injury to the steamship. Immediately after the tug and tow backed out into the

stream and proceeded on to their destination. The collision occurred about 11:40 A. M.

VIII. That the Brooklyn Eastern District Terminal carfloat No. 2 and the steamtug Industry were in tow and under the control of the said steamtug Intrepid and depended entirely upon the said steamtug Intrepid in their navigation.

IX. That the damages alleged to have been sustained by the collision, namely \$35,000.00, are greatly in excess of the value of respondent's interest in said steamtug Intrepid, and that the said collision happened and the loss, damage and injury above referred to were done, occasioned and incurred without the privity or knowledge of the respondent. That there are no liens or claims outstanding against the said steamtug Intrepid except the claim of the libellant alleged herein. Respondent desires to claim the benefits of the provisions of Sections 4283, 4284 and 4285 of the Revised Statutes of the United

States and the Acts amendatory thereof and supplemental thereto.

X. All and singular the premises are true.

Wherefore, respondent prays that this court will cause due appraisal to be had of the amount of the value of the respondent's interest in the said steamtug Industry at the close of said voyage, and of her freight then pending, and will make an order for the payment of same into court, or for the giving of stipulation with surety providing for the payment thereof, as ordered by the court, and that the liability of the respondent be limited to the amount of the value of the respondent's interest in said steamtug Intrepid and her freight pending at the close of said voyage, and that the respondent may have such other and further relief in the premises as may be just.

CARPENTER & PARK,
Proctors for Respondent,

No. 79 Wall Street, New York City, N. Y.

COUNTY OF NEW YORK,
Southern District of New York, ss:

J. H. McCafferty, being duly sworn, says that he is the secretary of the Brooklyn Eastern District Terminal, a corporation, and the respondent herein. That he has read the foregoing answer, knows the contents thereof and that the same is true to the best of his knowledge, information and belief. That the reason this verification is made by deponent and not by said respondent is that respondent is a corporation of which this deponent is an officer, to wit, its Secretary.

That the sources of deponent's information and the grounds of his belief in the premises are statements made to the deponent by the agents and employees of the respondent.

J. F. McCAFFERY.

Sworn to before me this 30th day of July, 1914.

[SEAL.]

HARRY V. WERNEKEN,
Notary Public, New York County.

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Exceptions to Answer.

United States District Court, Southern District of New York

LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION COMPANY,
Limited, Libellant,

against

BROOKLYN EASTERN DISTRICT TERMINAL, Respondent.

The libellant above named hereby excepts to the answer of the Brooklyn Eastern Terminal, respondent, as follows:

First: That the allegations in the Fourth, Seventh, Eighth and Ninth articles of said answer are insufficient in law on the face thereof and institute no defense to the cause of action set forth in the libel herein.

Dated, New York, December 7th, 1914.

BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for Libellant.

To Messrs. Carpenter & Park, Proctors for Respondent.

12 United States District Court, Southern District of New York.

LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION COMPANY,
Libellant,

against

BROOKLYN EASTERN DISTRICT TERMINAL, Respondent.

Before Hon. C. M. Hough, District Judge.

New York, February 25, 1916.

Appearances:

Messrs. Park & Mattison (Mr. Park), Proctors for Libellant;
Messrs. Burlingham, Montgomery & Beecher (Mr. Clark), Proctors
for Respondent.

Mr. Park: If your Honor please, I wish to amend Article 3 of the answer, in the fifth line from the bottom thereof, on the first page, in alleging as follows. "Likewise respondent admits that at about 11.40 A. M. on said day a collision occurred between a carfloat"—and I wish to put in there "the Brooklyn Eastern District Terminal Carfloat No. 2."

And likewise Article 7, in which I have alleged in the answer that it was a Delaware, Lackawanna & Western Carfloat No. 2; I wish to make the statement that it was the Brooklyn Eastern District Terminal Carfloat No. 2; so all of the fleet were owned by the
13 Eastern District Terminal. There is no dispute upon that point.

Motion granted.

The incorporation of the libellant company and ownership is
mitted.

JOHN H. McCafferty, being duly sworn and examined as a
ness for libellant, testifies:

Direct examination,

By Mr. Park:

Q. Mr. McCafferty, are you secretary of the Brooklyn Eastern
District Terminal?

A. Yes, sir.

Q. Is that a corporation?

A. Yes, sir.

Q. Organized under the laws of what State?

A. State of New York.

Q. On the 29th day of April, 1914, was that company the owner
of the steamtug Intrepid?

A. No. All the equipment is owned by Havemeyer & Elder, and
under lease from Havemeyer & Elder to the Brooklyn Eastern District
Terminal.

Q. But you have full charge of the boat under the terms of that
lease?

A. Yes, sir.

Q. And as owners you assume all liabilities, claims, &c., and have
the complete management of the boat, as well as pay all her expenses?

A. Yes, sir.

Q. So you were the owner pro hac vice?

A. I don't understand the term.

The Court: We will assume it.

14 Q. On April 29, 1914, were the master or any of the crew
of the Intrepid shareholders of the Brooklyn Eastern District
Terminal?

A. No.

Q. Who was your superintendent?

A. Thomas Kilpatrick.

Q. Did you personally know the master of the steamtug or not?

A. No, sir.

Q. When did you first hear of the accident?

A. I am not certain whether it was the afternoon of the day the
the accident occurred or the following day.

Q. Do you know whether any of the officers of this corporation
were on board of the Intrepid and engaged in her navigation or not?

A. I do.

Q. Were they?

A. No.

Cross-examined,

By Mr. Clark :

Q. Did you yourself take any personal part in engaging the master of the Intrepid?

A. No, sir.

Q. Do you know who of your Company did?

A. No; I am not certain; it was one of our superintendents whether it was the superintendent of maintenance or the operating superintendent I am not clear.

Q. What business is the Brooklyn Eastern District Terminal engaged in?

A. General terminal business.

Q. What do you mean by that?

A. Receiving and delivering of freight, incoming and outgoing general freight.

Q. Do you know personally anything about the particular business it was engaged in on April 29, 1914, at the time of the collision between the float No. 2 and the Vauban?

A. No, sir.

Q. You do not know where the tow was bound or where it came from?

A. No, sir.

Q. Or how it was made up?

A. No, sir.

15 Q. Do you know anything about the tug Industry that was also in this tow?

A. Well, I know that there was a tug by that name in operation by the company.

Q. But you know nothing about the navigation of that tug?

A. No, sir.

Q. Or who her master was?

A. No, sir.

Redirect examination.

By Mr. Park :

Q. Were there any outstanding claims or liens against the steam tug Intrepid on April 29, 1914?

A. Not that I know of.

THOMAS KILPATRICK, being duly sworn and examined as a witness for the libellant, testifies:

Direct examination.

By Mr. Park :

Q. Mr. Kilpatrick, are you the superintendent of the Brooklyn Eastern District Terminal?

A. I am.

Q. How long have you been superintendent?

A. Four years.

Q. Do you know Captain Peterson of the steamtug Intrepid?

A. I do.

Q. How long have you known him?

A. About three years up to the time of the accident.

Q. Was he a master of steamtugs in the employ of this company when you became superintendent of the Company?

A. He had been, yes.

Q. And was he master of one of your steamtugs during all the time of your superintendency up to this time?

A. He was.

Q. What do you know about him as a pilot?

A. He is a very good man.

16 Q. Had he had any accidents before this time or not?

A. None.

Q. What was the general scope of his duties?

A. Piloting the tugboats, towing the general business to the railroads.

Q. Between the terminals?

A. Between the terminals.

Q. And was he the master of the Intrepid on April 29, 1914?

A. He was.

Q. Was he a licensed man?

A. He was.

Q. What can you say about his skillfulness or unskillfulness?

A. His record was generally good.

Q. What was the general condition of the Intrepid on April 29, 1914?

A. Good.

Q. What had been her engagements with your company?

A. The same as the day of the accident.

Q. What had been her engagement—what had this tug been doing in your line?

A. Towing carfloats and lighters.

Q. Do you know the steamtug Industry?

A. We operate the Industry.

Q. You have control of it?

A. Yes, sir.

Q. In the same way that you had control of the Intrepid?

A. Yes.

Q. On April 29, 1914, was she what is known as in ordinary?

A. She was out of commission.

Q. Do you know whether orders were given by you for her to be taken in tow?

A. I ordered her towed to the terminal at Williamsburg.

Q. Where was she to be taken?

A. The dry dock.

Q. What dry dock?

A. Burt & Mitchell's

Q. Were the orders given to the master of the Intrepid?

A. Eventually, but not by me.

17 Q. But you gave orders to have her towed?

A. Yes, sir.

Q. Were any instructions given by you as to the method or manner in which she should be towed?

A. No.

Q. Who had charge of the makeup of the tow?

A. The captain.

Q. That was left entirely to his discretion?

A. Always.

Q. Did you give directions that this earfloat should be towed by the Intrepid or not?

A. I did not.

By the Court:

Q. Your instructions were simply that the Industry should be taken from Burt & Mitchell's dry dock to your dock?

A. Yes, sir.

By Mr. Park:

Q. There was no crew on board?

A. No.

Q. And no steam up?

A. No.

Q. Do you know whether any of the officers of the Brooklyn Eastern District Terminal were on board assisting in any way in her navigation?

A. They were not.

Cross-examined.

By Mr. Clark:

Q. Do you know where the Float No. 2 was taken in tow?

A. I don't remember where she was picked up at.

Q. She wasn't picked up at the same place as the tug Industry was she?

A. No; we wouldn't have a float in there.

Q. Do you know when she was taken in tow? Whether it was the same day of this collision or not?

18 A. Yes, it was the same day as the collision. Our tows are short tows.

Q. Do you know what was on the Float No. 2?

A. I know she had 19 cars.

Q. Loaded with what?

A. I couldn't say, general merchandise I suppose.

Q. Do you know where those cars were from?

A. I couldn't tell you that.

Q. Where were they going to?

A. Brooklyn Eastern District Terminal.

Q. They were consigned to your Terminal?

A. Yes, sir.

Q. With ther merchandise for your Terminal?

A. Yes.

Q. When you say that the merchandise was consigned to your Terminal; what was to be done with it there; was it consigned to your Terminal to be distributed?

A. Yes, sir, distributed to the consignees.

Q. That refers to all the cars that were on Float No. 2?

A. Yes.

Q. You can't say where the float was picked up?

A. No, I couldn't; I did know at the time, but I don't know now.

Q. Of course you do not know who made up the tow itself?

A. No, I do not.

Q. Is this terminal of yours at Williamsburg?

A. It is.

Q. What arrangement does your company have for the carrying of its carfloats with its cars of freight; is it a freight contract?

A. We have contracts with the railroads.

Q. And you are paid a certain amount for carrying the cars from wherever they start to your terminal at Williamsburg?

A. Yes, sir.

19 Q. And that was the condition and contract under which you were carrying these cars at that time?

A. Yes, sir.

Q. That is in pursuance of your ordinary course of business, is it?

A. Yes, sir.

Q. Do you know whether any crew was on board the tug Industry?

A. There was no crew.

Q. Are you positive of that?

A. Yes, sir.

Q. You didn't see the tug itself, did you?

A. Not at the time of the collision; but I know I didn't have a crew aboard the tug.

Q. You testify to that because you know that she was on the dry dock and that she must be towed from the dry dock to your terminal; that is what you base your testimony on?

A. Yes; we might have had a watchman on the boat, but outside of that there was nobody on the boat.

Q. You are sure there were no navigators on board?

A. I am sure of that.

Q. And you are quite sure if there were they took no part in the navigation?

A. I am quite positive.

Q. Do you know whether the master of the Intrepid was at the wheel at the time of the accident?

A. No, I don't know that.

Q. Does your company customarily carry a floatman on these floats, such as Carfloat No. 2?

A. We do.

Q. Do you know whether there was a floatman on this float or not?

A. Without seeing, I might say yes; it is the practice.

By the Court:

Q. It would be the ordinary practice and course of business to have one on, wouldn't it?

Yes, sir.

20 By Mr. Clark:

Q. What are the duties of the floatman?

A. Assisting in making fast, and handing lines to the carfloat crews, and to see that the cars are not tampered with, and handing the papers of the cargoes to the company.

Q. Anyone to act as lookout on the float?

A. To act as lookout on the float and report any damage done to the equipment, either by his boat or some other boat.

Q. And act as lookout while the vessel is navigating and report if the vessel was about to come into collision, would it be his duty to signal to the tug?

A. It would be his duty to do that if he knew such a thing was going to happen; you would naturally expect him the same as any other employee to do anything to avert a collision, or assist in averting it.

By Mr. Park:

Q. Where is Captain Petersen now?

A. Operating a tugboat for the Government in the Panama Canal.

Q. Mate?

A. To the best of my knowledge.

NEIL H. BARNES, being duly sworn and examined as a witness for libellant, testifies:

Direct examination.

By Mr. Park:

Q. Are you a licensed man?

A. Yes, sir.

Q. Were you licensed on April 29, 1914?

A. Yes, sir.

Q. On that date were you mate of the Intrepid?

A. Yes, sir.

21 Q. Who was her master?

A. Captain Petersen.

Q. Did you have Carfloat No. 2 on your port side?

A. Yes, sir.

Q. Where did you pick up that carfloat?

A. Lackawanna.

Q. Where did you pick up the steamtug Industry?

A. At the Morris Canal, Jersey City.

Q. Any crew aboard of the Industry or not?

A. None whatsoever.

Q. Any steam on her?

A. No, sir.

Q. Who had charge of the making up of that tow?

A. The captain.

Q. Who was in the pilot house in charge of the Intrepid at the time of the collision with the Vauban?

A. The captain.

Q. Was anybody on board of the steamtug Intrepid excepting the master and the crew thereof?

A. Only the crew.

Cross-examined.

By Mr. Clark:

Q. Was there anyone on the Carfloat No. 2?

A. All those floats have a floatman at all times, night and day.

Q. He was on the float, was he?

A. Oh, yes, that is his place.

Q. What time of day was this collision?

A. I don't remember the time.

Q. Where were you at the time of the collision?

A. In the pilot house with the captain.

Q. Did you see the floatman on the float?

A. No.

Q. Do you know whether he was there or not?

A. Oh, yes, that is his place.

Q. He was there somewhere?

A. Somewhere, yes.

22 Q. What was the first you know of the collision?

A. Oh, I seen the thing happen; I was in the pilot house.

Q. How long was it before the collision that you thought there was going to be a collision?

A. Oh, well, it happened so quick—why, them things happen so soon you don't see them coming ahead of time until they happen.

Q. About how far forward of your bow did the bow of the carfloat extend?

A. Well, about two lengths of the Intrepid was the full length of the float, and our stern is just about even with the stern of the float, the way they make fast to steer the floats.

Q. How long was the Intrepid?

A. I should judge the Intrepid was about 95 feet long.

Q. That would make the bow of the float about 95 feet ahead of the bow of your tug?

A. About.

Q. You received no warning from anyone else while you were in the pilot house that she was coming into collision, did you?

A. Oh, no; the captain has full charge when he is at the wheel; I have nothing to do whatsoever; he is responsible for the boat; he is master of the boat.

Q. You didn't hear anyone on the float call out to the tug that she was coming in collision?

A. Not as I know of.

United States District Court, Southern District of New York.

LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION COMPANY,
LTD., Libellant,

against

BROOKLYN EASTERN DISTRICT TERMINAL, Respondent.

Burlingham, Montgomery & Beecher, Proctors for Libellant;
Carpenter & Park, Proctors for Respondent.

AUGUSTUS M. HAND, *District Judge.*

The respondent's answer seeks to limit its liability in a proceeding in personam to its steamtug Intrepid. The answer alleges that a collision with libellant's steamship Vauban occurred on the part of respondent's tug Intrepid having in tow Delaware, Lackawanna & Western cargo boat No. 2 and the steamtug Industry which was under the control of the Intrepid and under no steam. The libellant files exceptions to the respondent's answer upon the ground that the respondent should surrender both tugs and the tow and not merely the tug Intrepid. I should feel much doubt as to the issues of law thus raised as an original question, but it seems to me that under the

rule laid down in *The W. G. Mason*, 142 Fed., 913, the Intrepid only can be held a "vessel at fault." If the Industry had been engaged with the Intrepid in the towing, the case would have been different. The rule laid down by the Circuit Court of Appeals in *The Anthracite*, 168 Fed., 693, would have then been applicable.

Judge Lacombe in his unreported decision last winter in a proceeding by the New York, New Haven & Hartford R. R. Co., as owners of the steamtug Transfer No. 21, to limit its liability to the tug in control, held that the tow need not be surrendered upon a claim in personam for personal injuries. He limited the liability to the tug and said:

"It seems the plain intent of the statute to limit the liability of an owner to the value and freight of his offending vessel."

The *Bordentown*, 40 Fed., 683, is distinguishable because there both tugs were engaged in towing and, therefore, both in the opinion of Judge Addison Brown, occasioned the collision. It is to be noticed that there only those two offending tugs and not the tow, were surrendered. That case is, therefore, exactly in accord with the views I have expressed. In other words, a vessel to be regarded as at fault must have acted itself either as a directing cause or an active co-operating factor in occasioning the injury.

The exceptions should, therefore, be overruled.

A. N. H., *D. J.*

25

Order Overruling Exceptions to Answer.

At a Stated Term of the District Court of the United States for the Southern District of New York, Held at the Court Rooms, in the Post Office Building, in the Borough of Manhattan, City of New York, on the 23rd Day of March, 1915.

Present: Honorable Augustus M. Hand, District Judge.

LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION COMPANY,
Libellant,

against

BROOKLYN EASTERN DISTRICT TERMINAL, Respondent.

Exceptions to the allegations of the Fourth, Seventh, Eighth and Ninth articles of the answer herein having been filed by the libellant, and said exceptions having come on to be heard, after hearing Norman B. Beecher, Esq., of counsel, in support of said exceptions, and Samuel Park, Esq., of counsel, in opposition thereto, and due deliberation having been had, on motion of Carpenter & Park, proctors for the respondent, it is

Ordered, that said exceptions be and the same hereby are overruled.

AUGUSTUS M. HAND.

26

Opinion.

HOUGH, J. (Orally):

Under the pleadings in this case and the decision of Judge A. N. Hand, it must be held that although the entire flotilla which came in contact with the Vauban was owned by the respondent in this case, only the navigating vessel, namely the Intrepid, need be surrendered upon the admission of fault in navigation contained in the answer.

(To Counsel:) Is the value of the Intrepid agreed upon?

Counsel: We will agree upon it.

The Court: A decree will therefore be entered in favor of the libellant for the agreed or ascertained value of the Intrepid, with interest from the date of the payment of bills.

Feb. 25, 1916.

Final Decree.

At a Stated Term of the District Court of the United States the Southern District of New York, Held at the Court Room Borough of Manhattan, City of New York, on the 6th Day of August, 1917.

Present: Hon. Martin I. Manton, District Judge.

LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION COMPANY, LTD., Libellant,

against

BROOKLYN EASTERN DISTRICT TERMINAL, Respondent.

A libel having been filed in the above entitled cause alleging damages sustained by reason of collision between libellant's steam tug Vauban and respondent's float Brooklyn Eastern District Terminal No. 2 in tow of respondent's tug Intrepid, and an answer having been filed by respondent admitting fault and negligence of respondent's agents and servants in charge of the Intrepid, and alleging that damages alleged to have been sustained by libellant are greatly in excess of respondent's interest in said tug Intrepid, and claiming the benefits of the provisions of §§4283, 4284 and 4285 of the Revised Statutes of the United States and the Acts amendatory thereof and supplemental thereto, limiting its liability to the value of its interest in the Intrepid, and the libellants having filed exceptions to respondent's answer and said exceptions having come on to be heard and having been overruled, and the cause having come on for trial and having been heard on the pleadings and proof of the respective parties, and due deliberation having been had, a decision having been rendered in favor of libellant for the amount of its damages sustained by reason of the matters set forth in the libel not exceeding the value of the steamtug Intrepid and her pending freight as of April 29th, 1914, the date of the collision, and interest from April 29th, 1914, and the libellant's damages having been agreed upon at the sum of \$28,036.98, with interest amounting to \$5,539.84, as appears from the annexed stipulation, and the value of respondent's steamtug Intrepid having been agreed upon at the sum of \$5,750.00, as appears from the annexed stipulation, and libellant's costs having been taxed at the sum of \$—, it is

Ordered, adjudged and decreed, that the libellant herein, Liverpool, Brazil and River Plate Steam Navigation Company, shall recover from the respondent, Brooklyn Eastern District Terminal, the sum of \$5,750.00, the value of respondent's interest in the steamtug Intrepid as of April 29th, 1914, the date of the collision aforesaid, with interest from April 29th, 1914, amounting to \$1,128.92, together with \$39.90, libellant's costs as taxed by the Clerk of this Court, making in all the sum of — dollars (\$6,918.82) with interest thereon until paid.

And it is Further ordered that unless this decree be satisfied or proceedings thereon be stayed on appeal within the time and in the manner prescribed by the rules and practice of this Court, the stipulators for costs and value on the part of the respondent cause the engagements of their stipulations to be performed, or show cause why execution should not issue against their goods, chattels and credits to enforce satisfaction of this decree.

MANTON,
U. S. D. J.

Notice of settlement waived.
PARK & MATTISON,
Proctors for Respondent.

Stipulation.

United States District Court, Southern District of New York.

LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION COMPANY,
LIMITED, Libellant,
against

BROOKLYN EASTERN DISTRICT TERMINAL, Respondent.

It is stipulated and agreed between the proctors for the respective parties hereto that the value of the steamtug Intrepid as of April 29, 1914, was \$5,750.

New York, August 3rd, 1917.

BURLINGHAM, MONTGOMERY &
BEECHER,

Proctors for Libellant.

PARK & MATTISON,
Proctors for Respondent.

Stipulation.

United States District Court, Southern District of New York.

LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION COMPANY,
LTD., Libellant,
against

BROOKLYN EASTERN DISTRICT TERMINAL, Respondent.

It is Stipulated between the proctors for the respective parties hereto that the damages sustained by the S. S. Vauban in the above entitled suit as a result of collision between the Vauban and float in tow of the Intrepid is \$28,036.98, with interest amounting to \$5,539.84. The above stipulation is without prejudice to the rights of either party herein to appeal.

New York, August 3rd, 1917.

BURLINGHAM, MONTGOMERY &
BEECHER,

Proctors for Libellant.

PARK & MATTISON,
Proctors for Respondent.

Notice of Appeal.

United States District Court, Southern District of New York.

LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION CO., LT
Libellant,

against

BROOKLYN EASTERN DISTRICT TERMINAL, Respondent.

SIR: Take Notice that the libellant hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the final decree in the above case entered in this court on the 6th day of August, 1917.

New York, August 17, 1917.

Yours, &c,

BURLINGHAM, MONTGOMERY &
BEECHER,

Proctors for Libellant.

PARK & MATTISON,

Proctors for Respondent.

27 William Street, New York.

To: Messrs. Park & Mattison, Proctors for Respondent, 79 Wall Street, New York.

Assignment of Error.

United States District Court, Southern District of New York.

LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION CO., LT
Libellant,

against

BROOKLYN EASTERN DISTRICT TERMINAL, Respondent.

Liverpool, Brazil & River Plate Steam Navigation Company, Libellant herein, hereby assigns errors to the final decision and decree of the District Court of the United States for the Southern District of New York as follows:

1. In that the Court held that although the entire flotilla which came in contact with the Vauban was owned by the respondent, on the navigating vessel, the Intrepid, need be surrendered.

2. In that the Court made a decree in favor of the libellant for the sum of \$6,918.82 only.

3. In that the Court allowed the libellant a recovery for the value of the Intrepid alone.

4. In that the Court failed to hold that the entire flotilla of the same ownership which came in contact with the Vauban should be surrendered.

5. In that the Court failed to allow libellant a recovery for the full amount of its damages, \$33,576.82.

BURLINGHAM, MONTGOMERY &
BEECHER,

Proctors for Libellant,

27 William Street, New York.

34 *Stipulation.*

United States District Court, Southern District of New York.

LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION COMPANY,
LIMITED, Libellant,

vs.

BROOKLYN EASTERN DISTRICT TERMINAL, Respondent.

It is Hereby Stipulated and Agreed, that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

PARK & MATTISON,

Attorneys for Respondent-Appellee.

BURLINGHAM, MONTGOMERY &
BEECHER,

Attorneys for Libellant-Appellant.

35 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION COMPANY,
LIMITED, Libellant.

vs.

BROOKLYN EASTERN DISTRICT TERMINAL, Respondent.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this — day of — in the year of our Lord one thousand nine hundred and seventeen, and of the Independence of the said United States the one hundred and thirty —.

[SEAL.]

ALEXANDER GILCHRIST, *Clerk.*

36 United States Circuit Court of Appeals for the Second Circuit
October Term, 1917.

No. 159

LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION COMPANY
Libellant-Appellant,

v.

BROOKLYN EASTERN DISTRICT TERMINAL, Respondent-Appellee.

Argued January 11, 1918.

Decided February 13, 1918.

Appeal from the District Court of the United States for the Southern
District of New York.

Before Ward and Rogers, Circuit Judges, and Learned Hand, District
Judge.

Burlingham, Montgomery & Beecher, for Libellant-Appellant.
Park & Mattison, for Respondent-Appellee.

Per Curiam:

Decree affirmed and motion for certification denied.

37 At a Stated Term of the United States Circuit Court of Appeals
in and for the Second Circuit, Held at the Court Room
in the Post Office Building, in the City of New York, on the 23rd
Day of February, One Thousand Nine Hundred and Eighteen.

Present:

Hon. Henry G. Ward, Hon. Henry Wade Rogers, Circuit Judges
Hon. Learned Hand, District Judge.

LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION COMPANY
LTD., Libellant-Appellant,

v.

BROOKLYN EASTERN DISTRICT TERMINAL, Respondent-Appellee.

Appeal from the District Court of the United States for the Southern
District of New York.

This cause came on to be heard on the transcript of record from the
District Court of the United States, for the Southern District of New
York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is affirmed with costs.

H. G. W.

H. W. R.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

38 Endorsed: United States Circuit Court of Appeals, Second Circuit. Liverpool etc. Navigation Co. v. Brooklyn East. Dist. Term. Co., Order for Mandate. United States Circuit Court of Appeals Second Circuit. Filed Feb. 25, 1918. William Parkin, Clerk.

39 UNITED STATES OF AMERICA,
 Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 38 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Liverpool, Brazil & River Plate Steam Nav. Co. against Brooklyn Eastern District Terminal Co. as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 14th day of March in the year of our Lord One Thousand Nine Hundred and eighteen and of the Independence of the said United States the One Hundred and forty-second.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

39½ UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which Liverpool, Brazil & River Plate Steam Navigation Company, Limited, is appellant, and Brooklyn Eastern District Terminal is appellee, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and

removed into the Supreme Court of the United States,
 40 hereby command you that you send without delay to the
 Supreme Court, as aforesaid, the record and proceedings
 said cause, so that the said Supreme Court may act thereon as
 right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of
 United States, the first day of May, in the year of our Lord one th
 sand nine hundred and eighteen.

JAMES D. MAHER,

Clerk of the Supreme Court of the United States

40½ [Endorsed:] File No. 26431. Supreme Court of the Un
 States, October Term, 1917. No. 964. Liverpool, Brazil
 River Plate Steam Navigation Company vs. Brooklyn Eastern Dist
 Terminal. Writ of Certiorari. United States Circuit Court of
 Appeals, Second Circuit. Filed Jun- 12, 1918. William Parkin, Cl

41 Supreme Court of the United States, October Term, 1917.

No. 964.

LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION COMPAN
 LTD., Petitioner,

against

BROOKLYN EASTERN DISTRICT TERMINAL, Respondent.

It is hereby stipulated and agreed that the certified transcript
 record filed with the petition for a writ of certiorari herein may
 taken as the return to the said writ, and that a copy of this stip
 tion may be returned by the Clerk of the United States Circuit Co
 of Appeals as his return to the writ of certiorari.

Dated, New York, June 11, 1918.

ROSCOE H. HUPPER,

*Proctor for Liverpool, Brazil & River Plate
 Steam Navigation Company, Ltd., Petitioner*

PARK & MATTISON,

SAMUEL PARK,

Proctor for Brooklyn Eastern District Terminal, Respondent

Endorsed: United States Circuit Court of Appeals for the Sec
 Circuit. Filed Jan. 12, 1918. William Parkin, Clerk.

42 To the Honorable the Supreme Court of the United Sta
 Greeting:

The record and all proceedings whereof mention is within ma
 having lately been certified and filed in the office of the clerk of
 Supreme Court of the United States, a copy of the stipulation

counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated, New York, June 13th, 1918.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,

*Clerk of the United States Circuit Court of
Appeals for the Second Circuit.*

43 [Endorsed:] 406-18—26431. United States Circuit Court of Appeals, Second Circuit. Liverpool, Brazil & River Plate Steam Nav. Co. v. Brooklyn Eastern District Terminal. Return to Certiorari.

44 [Endorsed:] File No. 26431. Supreme Court U. S. October Term, 1918. Term No. 406. Liverpool, Brazil & River Plate Steam Navigation Co., Petitioner, vs. Brooklyn Eastern District Terminal. Writ of Certiorari and return. Filed June 26, 1918.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 9-1131

**LIVERPOOL, BRAZIL & RIVER PLATE STEAM
NAVIGATION COMPANY,**

(Defendant-Appellant)

vs.

Petitioner,

BROOKLYN EASTERN DISTRICT TERMINAL,

(Respondent & appelle)

Respondent

**PETITION FOR WRIT OF HABEAS CORPUS
AND BRIEF**

**CHARLES C. MUELLINGHAM,
ROSCOE H. HUPPES,**

Counsel



SUPREME COURT OF THE UNITED
STATES.

LIVERPOOL, BRAZIL & RIVER PLATE
STEAM NAVIGATION COMPANY,
(Libellant-Appellant),
Petitioner,

AGAINST

BROOKLYN EASTERN DISTRICT TERMINAL,
(Respondent-Appellee),
Respondent.

No.
October
Term,
1917.

SIRS:

TAKE NOTICE that the annexed petition for a writ of certiorari will be presented to the Supreme Court of the United States on Monday, April 15, 1918.

Dated, New York, April 3rd, 1918.

ROSCOE H. HUPPER,
Proctor for Petitioner.

To:

MESSRS. PARK & MATTISON,
Proctors for Respondent-Appellee.

SUPREME COURT OF THE UNITED
STATES.

LIVERPOOL, BRAZIL & RIVER PLATE
STEAM NAVIGATION COMPANY,
(Libellant-Appellant)
Petitioner,

AGAINST

BROOKLYN EASTERN DISTRICT
TERMINAL,
(Respondent-Appellee)
Respondent.

No.
October
Term,
1917.

PETITION

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Liverpool, Brazil & River Plate Steam Navigation Company respectfully alleges

The question which the petitioner seeks to have determined is one on which the Circuit Court of Appeal of several of the Circuits are in conflict. It is this: When a tug and tow are owned and operated by the same owner as a flotilla must the tow as well as the tug be surrendered in limitation proceedings instituted in respect of an accident resulting from the fault in navigation of the flotilla?

On April 29, 1914, the petitioner's steamship *Vauban* lying moored at Pier 8, Brooklyn, with her stern about 15 feet inside the end of the pier, was seriously damaged by collision with

Brooklyn Eastern District Terminal *Float No. 2*, which was in tow of the tug *Intrepid*. The *Intrepid* had the carfloat on her port side and the tug *Industry*, not under steam, on her starboard side.

The carfloat and both tugs were owned by the respondent company, and were under the control and direction of its employees as to all matters of navigation. The company was engaged in the business of receiving and delivering incoming and outgoing general freight under contract with various railroad companies. The carfloat had on board 19 cars loaded with merchandise consigned to the respondent's terminal at Williamsburg, there to be distributed to various consignees.

There was no crew on board the *Industry* except a watchman, and none on the float except the floatman, whose duty it was to handle the lines and see that the cars were not tampered with, and to take charge of the papers which accompanied the cargo.

The libellant, as owner of the *Vauban*, filed its libel in the District Court for the Southern District of New York, claiming \$35,000 damages on account of the collision and charging that the accident was caused by the negligence of the respondent, its agents and servants in charge of carfloat *No. 2* and the tugs.

The respondent's answer admitted the negligence of the agents and servants of the respondent in charge of the steamtug *Intrepid* (Record, fols. 22-3), alleged that the damages claimed in the libel were greatly in excess of the respondent's interest in the steamtug *Intrepid*, and prayed for limitation of its liability to the value of the tug *Intrepid* and her pending freight.

The libellant filed exceptions to those parts of the answer which set up a claim to a limitation of liability to the value of the tug *Intrepid*, and these exceptions were overruled by the District Court (A. N. Hand, *J.*, opinion, pp. 23-4). Thereafter the issue of the respondent's right to limitation was tried before Hough, *J.*, who rendered a decision in favor of the respondent (p. 26). The final decree (pp. 27-9), limited recovery to \$6,918.82, the agreed value of respondent's interest in the tug *Intrepid*, with interest and costs.

The libellant appealed to the Circuit Court of Appeals, assigning as error the holding of the District Court that only the navigating vessel need be surrendered, and the limitation of the damages to the value of the *Intrepid* alone (p. 33). The Circuit Court of Appeals affirmed the decree without opinion and denied the libellant's request for a certificate to this Court. The Court had already decided the questions presented by the assignments of error in the case of *Transfer No. 21*.

The only question involved on this application is one of law. Fully stated it as follows:

Where two or more vessels without motive power are lashed alongside and in tow of a steamtug, all the vessels being owned by the same owner, engaged in the same enterprise, and operated by the same servants of the common owner, and one of the towed vessels collides with another vessel through the negligence of the owner's servants aboard the tug in navigating the flotilla, is the owner of the flotilla entitled to the benefit of the limitation of liability provided for in Section

4283, 4284 and 4285 of the Revised Statutes (1) on surrendering the tug alone, or (2) must the owner also surrender the vessel which actually came into collision, or (3) must he surrender the whole flotilla?

GROUNDS ON WHICH A WRIT OF CERTIORARI
IS ASKED.

1. The decision of the Circuit Court of Appeals for the Second Circuit in this case and in the *Transfer No. 21* (December, 1917, not yet reported; extract from opinion annexed to Brief herein), is directly contrary to the rule laid down by the Circuit Courts of Appeals for the Sixth and Ninth Circuits, that when several vessels are engaged in a common enterprise, owned by the same owner and physically connected, they must all be surrendered in limitation proceedings.

Such a conflict between the various circuits is a well-recognized ground for certiorari. Indeed, one of the main purposes of the statutory provision for *certiorari* to a Circuit Court of Appeals is to enable this Court to put an end to such conflicts. *Warner v. New Orleans*, 167 U. S., 467, 474; *Forsyth v. Hammond*, 166 U. S., 506.

2. The assumption by the Courts below that a vessel need not be surrendered unless "at fault" and liable *in rem*, is at variance with the decisions of this Court holding that the limitation statutes apply, and that a ship may be surrendered, in cases where there is no liability *in rem*.

3. The assumption by the Courts below that the tug but not the floats would be liable *in rem* for the negligent navigation of the flotilla, which all were owned by the same owner, in character of his servants as to their navigation and navigated as a unit, does not find sanction in any of the decisions of this Court and seems to be disapproved in its decisions dealing with the liability of the tow, when the tug and tow are owned by different owners, for damage caused to third vessels by the negligence of those on board the tug.

4. The gravity and wide-reaching importance of the question of law presented in this case, such as to merit the intervention of this Court by writ of certiorari.

The question of the extent of an owner's liability *in personam* in connection with marine accidents in enclosed harbors, where a large part of the transportation is by means of flotillas made up of vessels of the same ownership and propelled by motive power supplied by one of the component vessels, is of the utmost importance. On account of their unwieldiness and weight such flotillas often have a great potentiality for damage to other vessels when negligently navigated, and transportation companies and other owners of such flotillas frequently incur liability for such negligent navigation. It would seem that the liability of the owners of these groups of vessels, certainly for damage inflicted by them as a group when the momentum and unwieldiness of the tow contribute to the damage, should be in some measure proportioned to their power for doing harm when in

properly handled, to the risk which other vessels are compelled to assume from their improper navigation, and to the amount which the owner has embarked in his venture, rather than to the value of the particular craft on which the engines happen to be located. Moreover, the tugs contribute as fully to the damage as if they were a part of the structure of the tug. The rule of the Circuit Court of Appeals for the Second Circuit, therefore, gives the owners of such flotillas a partial immunity from liability not enjoyed by other ship owners, and certainly never intended when the statute was enacted.

In the interest of both uniformity and definiteness of the law and in order to remedy what seems to be an artificial application of the limitation statutes leading to an inequitable result, this Court should place an authoritative interpretation on the statutes applicable to casualties in which such flotillas are concerned.

Your petitioner presents in connection with this petition a brief, discussing more fully the contentions above stated with citation of authorities.

WHEREFORE your petitioner prays that this Honorable Court will issue a writ of certiorari requiring the United States Circuit Court of Appeals for the Second Circuit to certify the record herein so that this Court may act thereon as of right and according to law ought to be done.

And your petitioner will ever pray.

LIVERPOOL, BRAZIL & RIVER PLATE
STEAM NAVIGATION COMPANY,

By DAVID COOK,
Agent.

SOUTHERN DISTRICT OF NEW YORK, }
 City and County of New York, } ss.:

DAVID COOK, being duly sworn, says that he is the agent for the Liverpool, Brazil & River Plate Steam Navigation Company herein; that he has read the foregoing petition and knows the contents thereof, and that the allegations therein contained are true to the best of his knowledge and belief.

DAVID COOK.

Sworn to before me this 3rd }
 day of April, 1918. }

LEO J. GIULFOYLE,
 [SEAL] Notary Public,
 Kings County, No. 136.
 Certificate filed in New York County.

I hereby certify that I have examined the foregoing petition and in my opinion it is well founded and is entitled to the favorable consideration of the Court.

ROSCOE H. HUPPER,
 Counsel.

SUPREME COURT OF THE UNITED
STATES

LIVERPOOL, BRAZIL & RIVER PLATE
STEAM NAVIGATION COMPANY,
(Libellant-Appellant)
Petitioner,

AGAINST

BROOKLYN EASTERN DISTRICT
TERMINAL,
(Respondent-Appellee)
Respondent.

October
Term,
1917.
No.

BRIEF IN SUPPORT OF PETITION

FIRST POINT.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IN THIS CASE AND IN THE CASE OF TRANSFER NO. 21 ON WHICH IT IS BASED IS IN CONFLICT WITH THE DECISIONS OF THE CIRCUIT COURTS OF APPEALS FOR THE SIXTH AND NINTH CIRCUITS WHICH HOLD THAT BOTH THE TUG AND THE TOW MUST BE SURRENDERED.

In the case at bar the Circuit Court of Appeals affirmed the decision of the District Court, without opinion, as the Court had already passed on the same question in December, 1917, in the

case of *Transfer No. 21*. This decision has yet been reported, but we have annexed to this brief the opinion so far as it relates to the question here involved. In that case the New York & New Haven & Hartford Railroad Company, owner of *Transfer No. 21* and of two earfloats in tow alongside, was sued in the New York Supreme Court for damages sustained by collision between one of the earfloats and a motor boat resulting in the destruction of the motor boat and the loss of two lives. The damages were laid at \$112,000.

The Railroad Company filed a petition for limitation of liability in the District Court of the Southern District of New York and asked for limitation to the value of the tug alone. The District Court allowed the limitation. The Circuit Court of Appeals affirmed the lower Court. Ward, J., said:

"A tug and tow are for some purposes regarded as a single vessel, as, for example, in connection with steering and sailing rules, but *in this Circuit* (italics ours) the petitioner in limited liability proceedings is required to surrender only the vessel at fault. A tow without motive power alongside a tug and moved by it cannot be at fault."

The rule thus laid down is directly contrary to that established by decisions of the Circuit Courts of Appeal for the Sixth and Ninth Circuits.

In *Thompson Co. v. McGregor*, 207 Fed., 207 (C. C. A., 6th Circuit), a lighter without motive

power was being used with a tug belonging to the same owner to help float a stranded steamer. The lighter was used to receive part of the cargo from the steamer; the tug, which was attached to the steamer but not to the lighter, was attempting to pull the ship off the rocks. The accident out of which the claims arose was caused by the bursting of a defective boiler on the lighter. The Court held that both tug and lighter must be surrendered in limitation proceedings, and quoting from the opinion of the Court below said:

“Whether or not the master of the *Elwood* had general control, the *Stewart* (lighter) was, as between the *Merrick* (tug) and the *Stewart*, under the direction of the *Merrick's* captain. The *Merrick* had placed the *Stewart*, and would soon take her away unless the Thompson Company substituted some other tug for that duty. Under such circumstances, the two boats together constituted the unit that must be surrendered in order to justify a limitation of liability.
* * * (P. 212.)

“Unquestionably both the *Merrick* and the lighter were engaged in a common enterprise; they were physically connected, although, instead of being lashed rail to rail, the *Elwood* and a tow line intervened; the then existing act of the *Stewart* in lightering the *Elwood* was an act in aid of and in co-operation with the then existing pull of the *Merrick* on the tow line; and the act of the *Merrick* in so pulling was in co-operation with and in aid of the lightering being conducted by the *Stewart*.” (P. 213.) * * *

The Court further said:

"We conclude that it is to effectuate, not to defeat, the intent of Congress in its enactment of the laws empowering shipowners to limit their liability respecting marine disasters, to deny to an owner the right to surrender only one of two interdependent vessels, which he had negligently united and furnished, as here, for a joint service in releasing a stranded ship; it is enough in such circumstances to permit him to avail himself of the benefits of the limitation statutes at all." (P. 214.)

In *The Columbia*, 73 Fed., 226 (C. C. A., 9th Circuit), through the negligence of the master of a barge in tow of a tug in shifting its cargo the barge partially capsized, damaging the cargo and killing several persons on board. The Court held that both the tow and the tug must be surrendered in limitation proceedings, irrespective of any negligence on the part of the tug. The rule laid down is thus stated in the head note:

"When the owner of a barge which has no motive power undertakes to transport freight by means of the barge, such barge and a tug, belonging to the same owner, by which the motive power is supplied, become one vessel for the purposes of the voyage and the owner is not entitled to limit his liability, under Rev. St. §§4282-4290, for damages caused by the negligence of the crew of either craft, without surrendering both."

The Court said:

"When the tug made fast and took in tow the barge, to perform the contract of carriage, the two became one vessel for the purpose of that voyage, as much so as if she had been taken bodily on board the tug, instead of being made fast thereto by means of lines. *The Northern Belle*, 9 Wall., 526-529; *Sturgis v. Boyer*, 24 How., 110-122; *The Merrimac*, 2 Sawy., 595; Fed. Cas. No. 9478; *The Bordentown*, 40 Fed., 686 (p. 237).

* * * In the present case, the barge and tug had the same owner, and both were operated by the same carrier. In the voyage, both were necessarily under the control of the master of the tug. * * * The court below held that the collapsing of the barge was occasioned by the negligent shifting of some sacks of wheat by the master of the barge, and that act of his was the proximate cause of the loss and damage in question. But no question of proximate cause, we think, arises in the case, for the reason that the tug and barge are, in law, considered one vessel, for the purpose of the voyage in question, and, whether the accident giving rise to the loss and damage be directly attributable to the acts of the master of the barge, or to those of the master of the tug, it is equally the negligence of the carrier, for which it contracted to be liable. It results that, in according the petitioner a limitation of liability without the surrender of the tug *Ocklahoma*, the court below is in error." (P. 238.)

This decision was approved and followed in the Ninth Circuit in *Oregon v. Balfour*, 90 Fed.,

295, and in *Shipowners & Merchants Co. v. Hammond Lumber Co.*, 218 Fed., 161.

The decisions of the Sixth and Ninth Circuit apply the rule enunciated by this Court in *The Main v. Williams*, 152 U. S., 122, where the Court said: "As the object of the statute was to curtail the amount that would otherwise be recoverable it should not be construed to abridge the right of the owner of the injured vessel to a greater extent than its language will fairly warrant."

Even in the Second Circuit, it was assumed before the decision in *Transfer 21* that the rule laid down in the Sixth and Ninth Circuits was applicable. In the *Captain Jack*, 169 Fed., 45 (District of Connecticut, Platt, J.), the claim arose out of the breaking of part of a derrick mounted on a scow which was being used in wrecking operations on a sunken vessel. The Court held that not only the scow, but also the tug which had brought the scow to its position must be surrendered in the limitation proceedings, saying (page 459):

"Now it appears that the lighter and hoisting apparatus and tug were the component parts of a wrecking outfit which the petitioner used to raise the sunken *Zouave* in New Haven harbor. The lighter had no propulsive power of her own, and so the outfit was necessarily the one stated * * * She was fastened to the *Captain Jack* using her own engine to exhaust upon the sunken boat, and was, with the lighter, under the control and direction of the petitioner, taking a hand in the work when the accident occurred. No case which I have read, and I believe I have absorbed them all, offers any state of facts or any line of

reasoning upon such facts which would warrant the petitioner in expecting that upon the facts before this court he would be able to obtain the benefits which he seeks, without first surrendering the entire wrecking outfit which was sent over from New London to raise the sunken vessel."

In *Transfer 21* and in the case at bar the tug and float were not only physically connected, but the tow participated directly in the accident which caused the damage, the contact being between the tow and the third vessel. In both cases the course of the tow was negligently directed by the master of the tug who was the servant of the owner of both vessels, and the momentum of the whole flotilla to which the tow contributed, caused the damage.

A thorough search has failed to reveal any decision in which the rule apparently favored in the Second Circuit has been followed or approved in other circuits. It is apparent that the conflict between the rule laid down in other circuits and that of the Second Circuit can be terminated only by the intervention of this Court.

SECOND POINT.

THE CIRCUIT COURT OF APPEALS ERRED IN MAKING LIABILITY IN REM THE TEST OF THE OBLIGATION TO SURRENDER IN LIMITATION PROCEEDINGS.

The Circuit Court of Appeals for the Second Circuit seems to have assumed that unless a vessel is liable *in rem* it is not subject to surrender. In *Transfer 21* the Circuit Court of Appeals said: "but in this District the petitioner is required to surrender only the vessel or vessels at fault."

The limitation statutes apply in cases where the vessels to be surrendered are not subject to any liability *in rem*. In the *Hamilton*, 207 U. S., 398, the test of liability *in rem* was expressly discarded and this Court allowed the shipowner to limit liability for death claims for which no liability *in rem* existed. In *Richardson v. Harmon*, 222 U. S., 96, this Court held that the shipowner was entitled to limit his liability in accordance with the terms of the statute, although the damage occasioned by the vessel was to a structure on shore and the tort was not even maritime in its nature. It is thus apparent that a vessel concerned in an accident may be liable to surrender in limitation proceedings, although the accident does not give rise to any lien enforceable in admiralty and that there is no interdependency between liability of the ship *in rem* and the extent of the owner's liability *in personam*. It is submitted therefore that the decisions of the Sixth and Ninth Circuits are more in accord with the interpretation which this Court has given to the limitation statutes than the decision of the Circuit Court of Appeals in this case.

THIRD POINT.

THE CIRCUIT COURT OF APPEALS ERRED IN ASSUMING THAT THE TUG ALONE WAS LIABLE IN REM FOR THE NEGLIGENT NAVIGATION OF THE FLOTILLA.

In *Sturgis v. Boyer*, 24 How., 110, and in the *Eugene F. Moran*, 212 U. S., 466, this Court has decided that when a tug and tow are owned by different owners, the tow is not liable for damage resulting from the negligence of the servants of the owner of the tug in the navigation of the flotilla. These decisions are based on the doctrine that the tug in such a case is an independent contractor, and that it is improper to take the property of the owner of the tow, when his servants are innocent of any wrong, to satisfy the wrong of another. Their language strongly implies that if tug and tow were owned by the same owner and in control of his servants as to their navigation (*which is this case*) both tug and tow would be liable *in rem* for the negligent handling of the flotilla. In the *Eugene F. Moran*, 212 U. S., 466, the Court said:

"No doubt the fiction that a vessel may be a wrongdoer and may be held, although the owners are not personally responsible, on principles of agency or otherwise, is carried further here than in England (*The China*, 7 Wall., 53; *The Barnstable*, 181 U. S., 464, 467, 468; *Homer Ramsdell Transportation Co. v. La Compagnie Generale Transatlantique*, 182 U. S., 406, 413, 414) * * * but, after all, a fiction is not a satisfactory ground for taking one man's property to satisfy another man's wrong, and it should not be extended." (Italics ours.) (P. 474.)

In *Sturgis v. Boyer*, 24 Howard, 110, on which the Court relied in the *Eugene F. Moran*, the Court said:

“Vessels engaged in commerce are held liable for damage occasioned by collision, on account of the complicity, direct or indirect, of their owners, or the negligence, want of care or skill, on the part of those employed in their navigation. Owners appoint the master and employ the crew and consequently are held responsible for their conduct in the management of the vessel. *Whenever, therefore, a culpable fault is committed, whereby a collision ensues, that fault is imputed to the owners, and the vessel is just as much liable for the consequence as if it had been committed by the owner himself. No such consequences follow, however, when the person committing the fault does not, in fact, or by implication of law, stand in the relation of agent to the owners. Unless the owner and the person or persons in charge of the vessel in some way sustain towards each other the relation of principal and agent, the injured party cannot have his remedy against the colliding vessel.* (Italics ours.) By employing a tug to transport their vessel from one point to another, the owners of the tow do not necessarily constitute the master and crew of the tug their agents in performing the service. They neither appoint the master of the tug or ship the crew; nor can they displace either the one or the other.”

See also, the *Clarita and Clara*, 23 Wall., 1.

These decisions were not based on the fact that the tow was not being navigated, or that a

tow without rudder or engines could never become liable *in rem* for negligent navigation; but were based on the principle that the doctrine of the liability of the vessel as such should not be invoked for the purpose of mulcting an owner whose agents and servants had nothing to do with the navigation of the vessel and were innocent. They do not lend color to a suggestion that, where a towed vessel is negligently directed or propelled by the servants of the owner to whose control, in the course of their duty, she has been fully entrusted, she is not liable *in rem* when the propelling or directing force is communicated through a hawser just as when it is supplied by her own engines.

LAST POINT.

IT IS RESPECTFULLY SUBMITTED THAT THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

March 30, 1918.

ROSCOE H. HUPPER,
Counsel for Petitioner.

UNITED STATES CIRCUIT COURT
OF APPEALS

FOR THE SECOND CIRCUIT.

IN THE MATTER

OF

The Petition of NEW YORK, NEW
HAVEN AND HARTFORD RAILROAD
COMPANY, as owner of "Trans-
fer No. 21," for Limitation of
Liability.

OTTO SCHMUCK, *et al.*,
Appellants.

OPINION

Before—WARD, ROGERS and HOUGH,

*Circuit Judge*WARD, *Circuit Judge*:

November 25, 1912, at about 5:40 A. M., the motorboat *Pilot*, 33 feet long, 9 feet beam, bound east from New York to Long Island Sound on a fishing trip, came into collision with float No. 57 on the port side of *Transfer No. 21*, which was another float, No. 57, on her starboard side, was proceeding west from Oak Point to Greenville, New Jersey. The place of collision was near the Astoria shore just below Hallett's Point. The tide was running strong flood, the wind blowing a gale from the west and the morning very dark. The motorboat went under the bow, passed on

under the stern of the float and was carried by the tide to the foot of Hoyt Avenue, Astoria. The motorboat was a total loss, Otto Schmuck, her owner, sustained personal injuries and his guests, Joseph F. Willax and W. D. Livingstone, were drowned. Actions at law were begun in the Supreme Court of the State of New York for all these injuries to recover damages aggregating \$112,000.

The New York, New Haven and Hartford Railroad Company, owner of *Transfer No. 21*, and of the two floats, filed a petition for limitation of liability and gave a stipulation for the appraised value of *Transfer No. 21* in the sum of \$65,000, there being no pending freight. Schmuck and the personal representatives of Willax and Livingstone, moved that the limited liability proceeding be dismissed on the ground that the Court was without jurisdiction because the petitioner had not also surrendered or given a stipulation for the value of the two car floats.

Judge Lacombe denied the motion, holding that neither car float being at fault the petitioner had complied with the statute in giving a stipulation for the value of *Transfer No. 21*. We agree with him. A tug and tow are for some purposes regarded as a single vessel, as, for example, in connection with the steering and sailing rules, but in this circuit the petitioner in limited liability proceedings is required to surrender only the vessel or vessels at fault. A tow without motive power alongside a tug and moved by it cannot be at fault. In the case of *The Bordentown*, 40 Fed. Rep., 682, Judge Addison Brown required the claimant to surrender not only the tug *Bordentown*, which was in charge of the nav-

igation of the tow and at fault for proceeding in threatening weather, but also the helper tug *Winnie*, because she supplied part of the motive power and was acting under the orders of the master of the *Bordentown*. This Court in the subsequent case of the *W. G. Mason*, 142 Fed. Rep., 913, said that if the decision in the *Bordentown* was based upon the consideration that the personal liability of the owner was conclusive of the liability of the *Winnie in rem*, it was erroneous. So in this case the petitioner, as owner of *Transfer No. 21*, may be in fault and so liable to her value, but it is not in fault as owner of the floats because neither of them did or could do anything whatever to cause or prevent the collision.

This brings us to the question of the merits.

[The remainder of the opinion relates exclusively to the merits.]

The decree is affirmed.

December, 1917.

Office Supreme Court, U. S.
FILED

OCT 16 1919

JAMES D. MAHER,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1919—No. 81

**LIVERPOOL, BRAZIL AND RIVER PLATE STEAM
NAVIGATION COMPANY**

Libellant-Appellant

—against—

BROOKLYN EASTERN DISTRICT TERMINAL

Respondent-Appellee

BRIEF FOR LIBELLANT-APPELLANT.

VAN VECHTEN VEEDER

CHARLES C. BURLINGHAM

For Libellant-Appellant



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<i>Where two vessels without motive power are lashed alongside and in tow of a steamtug, the three vessels forming a flotilla owned in common, engaged in the same adventure, and operated by the servants of the owner, the owner is entitled to limit his liability for negligent navigation only upon surrendering the whole flotilla.</i>	5
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SUPREME COURT OF THE UNITED STATES

LIVERPOOL, BRAZIL & RIVER PLATE
STEAM NAVIGATION COMPANY,
Libellant-Appellant

against

BROOKLYN EASTERN DISTRICT TER-
MINAL,
Respondent-Appellee

October Term
1919
No. 81

BRIEF FOR THE APPELLANT

This case comes up on a writ of *certiorari* in review of an affirmance by the Circuit Court of Appeals for the Second Circuit of a final decree of the District Court for the Southern District of New York in admiralty. The libel was *in personam* to recover damages for a collision between the libellant's steamship *Vauban* and the respondent's flotilla composed of the tug *Intrepid* with a carfloat lashed to her port side and an idle tug lashed to her starboard side. On the respondent's answer admitting fault on the part of its servants in charge of the *Intrepid* and claiming the benefit of the provisions of U. S. Revised Statutes, Sections 4283-4285, in limitation of its liability, the respondent was permitted, over the libellant's exception, to limit its liability to the value of its interest in the tug *Intrepid*. The sole issue is whether the court below was correct in allowing the libellant a recovery for

the value of the *Intrepid* alone, or, as the libellant contends, was in error in not requiring the surrender by the respondent of the entire flotilla.

STATEMENT OF FACTS

On April 29, 1914, the steamship *Vauban* while lying at Pier 8, Brooklyn, bow in, with her stern about fifteen feet inside the end of the pier was damaged by collision with Brooklyn Eastern District Terminal carfloat No. 2, which was lashed alongside and in tow of the respondent's tug *Intrepid*. The *Intrepid*, with the carfloat on her port side and the tug *Industry* on her starboard side, was proceeding up the East River bound from Jersey City to Williamsburg.

The respondent, Brooklyn Eastern District Terminal, is engaged in the business of receiving and delivering incoming and outgoing general freight under contract with various railroad companies. The carfloat and both tugs were the property of the respondent, and were under the control and direction of its servants and agents. The carfloat had on board nineteen railroad cars loaded with merchandise consigned to the respondent's terminal for distribution. The tug *Industry* was not under steam, and only the respondent's watchman was aboard her. The sole employee on board the carfloat was a floatman, whose duty it was to handle lines and to take charge of papers relating to the cargo on the float.

In its answer the respondent admitted that the collision was brought about by the negligence of the agents and servants of the respondent in charge of the steamtug *Intrepid*. As set out

more fully in its answer, the respondent's statement of the occurrence was as follows:

"While proceeding up the East River upon the right hand side of the channel, near the Brooklyn shore and when about opposite the United Fruit Company's pier, there was a fruit steamer which had backed out of her pier and was turning around preliminary to departure for sea. Above the United Fruit steamship upon the Manhattan side of her was a steamtug with carfloats. Directly ahead of the *Intrepid* and her tow was a steamtug with a tow approaching the *Intrepid*. A signal of one whistle was exchanged between the *Intrepid* and the approaching tug and thereupon the helm of the *Intrepid* was put to port, shaping her course nearer the Brooklyn pier. While thus proceeding about off Pier 9, on account of the bow of the carfloat being in slack water and the stern of the tug and tow in the flood tide, the tug and tow sheered to starboard; in order to break the sheer the engines of the the *Intrepid* were reversed, the starboard corner of the carfloat coming in contact with the stern of the steamship *Vauban*, which was lying moored upon the southerly side of Pier 8" (Record, fols. 27-30).

Upon the respondent's claim in its answer to the benefit of the provisions of Sections 4283-4285 of the Revised Statutes in limitation of its liability to the value of its interest in the steamtug *Intrepid* and her pending freight, the libellant filed exceptions upon the ground that the respondent should be required to surrender both tugs and the tow. In overruling the exceptions, Judge A. N. Hand said:

"I should feel much doubt as to the issues of law thus raised as an original

question, but it seems to me that under the rule laid down in *The W. G. Mason*, 142 Fed., 913, the *Intrepid* only can be held a 'vessel at fault'; and to be regarded as at fault, he said, a vessel "must have acted itself either as a directing cause or an active cooperating factor in occasioning the injury" (Record, fols. 91-96).

Accordingly, on final hearing, District Judge Hough ruled that

"Under the pleadings in this case and the decision of Judge A. N. Hand, it must be held that although the entire flotilla which came in contact with the *Vauban* was owned by the respondent in this case, only the navigating vessel, namely the *Intrepid*, need be surrendered upon the admission of fault in navigation contained in the answer" (Record, fols. 101-102).

In the final decree the value of the respondent's interest in the *Intrepid* at the date of the collision was agreed upon in the sum of \$5,750, while the libellant's damages were agreed upon in the sum of \$28,036.98 (Record, fols. 105-114). On libellant's appeal to the Circuit Court of Appeals for the Second Circuit the decree of the District Court was affirmed without opinion, and libellant's motion for certification denied (Record, fols. 141-144). Subsequently, on the libellant's petition, this Court granted a writ of *certiorari*.

SPECIFICATION OF ERROR.

The libellant assigns as error the ruling that only the navigating tug, the *Intrepid*, need be surrendered in limitation of the respondent's liability (Record, fols. 129-132).

ARGUMENT

Where two vessels without motive power are lashed alongside and in tow of a steamtug, the three vessels forming a flotilla owned in common, engaged in the same adventure, and operated by the servants of the owner, the owner is entitled to limit his liability for negligent navigation only upon surrendering the whole flotilla.

The sole issue presented by this appeal is whether the respondent is entitled to limit its liability to its interest in the tug *Intrepid*, or whether it must surrender, in exoneration of its liability, its interest in the carfloat and the two tugs, which, lashed together, made up the flotilla which damaged the libellant's steamer.

It is the appellant's contention that where two vessels without motive power are lashed alongside and in tow of a steamtug, the three vessels forming a flotilla belonging to the same owner, engaged in the same enterprise, and controlled and operated by the servants of the common owner, and one of the towed vessels collides with another vessel through the negligence of the owner's servants navigating the tug, the owner is entitled to the benefit of the statutory limitation of liability only by the surrender of the whole flotilla.

Section 4283 of the Revised Statutes provides:

"The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, lost, damage, or forfeiture, done occasioned, or incurred, without privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of

the interest of such owner in such vessel and her freight then pending."

In the ordinary case of collision between two vessels there is little ground for dispute concerning what must be surrendered by the shipowner; and the statute is drawn with reference to the ordinary case. Where, however, as in the case at bar, more than one vessel is concerned in a disaster, the extent of the surrender required to take advantage of the statute becomes of great importance. It is important, in the first place, to the innocent party in the disaster, for, as applicable to the present case, if the respondent need surrender only its interest in the tug *Intrepid*, the libellant, although admittedly damaged by this collision in the sum of \$28,000, or with accrued interest nearly \$35,000, is limited by the decree appealed from to the value of the tug at \$5,750, with interest. The question involved is moreover, of general interest to carriers in view of the immense lighterage business carried on within our enclosed harbors, and, indeed, under present conditions, along our coasts and at sea.

In the case of *The Main v. Williams*, 152 U. S. 122, 131, in which it was held that "freight" as used in the limitation statute includes passenger money, this court stated the principle upon which we are content to rely in the determination of the pending issue:

"The real object of the act in question," said Mr. Justice Brown, in expressing the unanimous opinion of the court, "was to limit the liability of vessel owners to their interest in the adventure; hence, in assessing the value of the ship, the custom has been to include all that belongs to the ship, and may be presumed to be the property of the owner, not merely the

hull, together with the boats, tackle, apparel, and furniture, but all the appurtenances comprising whatever is on board for the object of the voyage, belonging to the owners, whether such object be warfare, the conveyance of passengers, goods or the fisheries. *The Dundee*, 1 Hagg., 109; *Gale v. Laurie*, 5 B. & C. 156, 164. It does not, however, include the cargo, which, presumptively at least, does not belong to the owner of the ship."

Accordingly, the appellant contends that the two tugs and the carfloat, physically united in the performance, through the servants of a common owner, of a common adventure, constitute in reality but a single instrumentality and must all be surrendered as a condition to the limitation of the owner's liability. It would seem to be too obvious for argument that the carfloat must be surrendered. Apart from the fact that she was the vessel which actually did the damage, she was the instrumentality by which the respondent undertook to perform the service for which it was paid. It surely can make no difference in principle, for the purposes of the limitation statute, whether cargo is carried in the hold of the same vessel which contains the motive power of transportation, or whether, as in this case, the motive power is in one vessel and the cargo is towed in another. In both cases the motive power and the hold are necessary instruments of the transportation. So the tug *Industry*, which was without steam and was joined to the flotilla for the convenience of the respondent, was, like the carfloat, also instrumental in causing the collision, inasmuch as her presence as part of the floating unit increased to that extent the difficulty of navigating the flotilla, and added to that extent to its mo-

mentum in the negligent course which brought about the disaster.

So far as courts of appeal have passed on the question, the Circuit Court of Appeals for the Second Circuit is opposed to the Circuit Court of Appeals for the Sixth and Ninth Circuits. In *Thompson Towing & Wrecking Association v. McGregor*, 207 Fed. 209, it appeared that a lighter without motive power was being used with a tug, the property of the same owner, to assist in floating a stranded steamer, when a defective pump boiler on the lighter exploded, injuring members of her crew. The Circuit Court of Appeals for the Sixth Circuit held that both tug and lighter must be surrendered in a limitation proceeding, since their situation at the time of explosion in effect converted them into a single instrumentality to effect a common purpose. The court pointed out that the negligence responsible was the negligence of the agent in charge of both boats, who equipped and sent the defective boiler as part of the working outfit, and the damage happened at a moment when these possibly separable units were in fact united.

"We conclude," said the court, "that it is to effectuate, not to defeat, the intent of Congress in its enactment of laws permitting ship owners to limit liability respecting marine disasters to deny to an owner the right to surrender one of two inter-dependent vessels when he had negligently united and furnished as here, for a joint service in releasing a stranded ship; it is enough in such situation to permit him to avail himself of the benefits of the limitation statutes at

The Circuit Court of Appeals for the Ninth Circuit has consistently maintained a similar position. In the early case of *The Columbian*, 73 Fed., 226, the court held that where

owner of a barge which has no motive power undertakes to transport cargo by means of the barge, the barge and tug, belonging to the same owner, become one vessel for the purposes of the voyage, and the owner may limit his liability for damages caused by the negligence of the crew of either craft only by surrendering both.

This view was reaffirmed when the same case came before the court a second time in *Oregon Railroad & Navigation Co. v. Balfour*, 90 Fed., 295, and in the subsequent cases of *The San Rafael*, 141 Fed., 270, and *Shipowners & Merchants Tugboat Co. v. Hammond Lumber Co.*, 218 Fed., 161. In *The San Rafael*, two ferryboats operated by the railroad company were both required to be surrendered in limitation of liability for a collision caused by their joint fault. The court pointed out that the purpose of the limitation proceeding was to limit all the liability of the railroad company, owner of both steamers, resulting from the collision between the two vessels;

"and it is for that very reason that it is a condition precedent to the granting of such relief that the parties seeking it surrender each and every vessel participating in the tort. It was so distinctly adjudged by this Court in the case of *The Columbia*, 73 Fed., 226."

In *Shipowners & Merchants Tugboat Co. v. Hammond Lumber Co.*, *supra*, it appeared that while two tugs of common ownership were towing a raft, one by a steel hawser attached to the tow, the other by a line attached to the other tug, the sea swept the tow broadside and the steel towing hawser pulled off the tug. The court held that both tugs must be surrendered, following its previous decision in *The Columbia*, *supra*, and the de-

cision of the Circuit Court of Appeals for the Sixth Circuit in *Thompson Towing & Wrecking Association v. McGregor*, *supra*.

In the Second Circuit a similar view was formerly maintained. In the early case of *The Bordentown*, 40 Fed., 682, in which the Pennsylvania Railroad Company sought to limit its liability for the loss of a flotilla of canal boats in tow of its tugs, Judge Addison Brown held (p. 687) :

"Where all the tugs employed belong to the same owner and are under one common direction and are engaged in the service at the time when the fault is committed, they are in the same situation, as it seems to me, as a single vessel as respects responsibility for the negligence of the common head. The words 'such vessel' in section 4283 embraces all such tugs (*The Arturo*, 6 Fed. Rep., 308). And all such must respond for the damages in proceedings for a limitation of liability."

This decision, as appears from Judge Adams' statement in *The Anthracite*, 162 Fed., 384, 388, was affirmed on appeal but not reported. The records of the Clerk of the United States Circuit Court show that it was affirmed without opinion on September 12, 1890, by Circuit Judge Lacombe.

In the later case of *The W. G. Mason*, 142 Fed., 913, the Circuit Court of Appeals for the Second Circuit handed down an opinion which has been a source of confusion in the Circuit. In that case two tugs belonging to the same owner were engaged in towing a steamer under a contract made with the owner of the tugs. The leading tug, the *Mason*, directed the movements of the ship. The rear tug, the *Babcock*,

which had a stern line to the ship, was under control of her own master. No fault was found on the part of the tug *Babcock*; the *Mason* was found solely in fault. This was not a limitation proceeding, but a suit in *rem* against the two tugs, and the question raised by the appeal, as the court points out, was whether the *Babcock* was liable in *rem* although not herself in fault. Whether the common owner of the two tugs would have been liable in *personam* in consequence of his failure to perform properly his towage contract, and whether, if such a suit had been brought, he could have limited his liability to the value of the tug *Mason*, are questions which were in no way involved in the suit and were not passed upon. The court, however, considers the cases of *The Bordentown*, *supra*, and *The Columbia*, *supra*, in examining the question whether common ownership affects liability in *rem*; and, while clearly recognizing the difference between such a case as it had before it, and cases where the question was as to what must be surrendered in a limitation of liability proceeding, proceeds to demonstrate by reference to *The China*, 7 Wall. 53, and other decisions of this court, that liability in *rem* is not co-extensive with the personal liability of the owner:

“If, as these authorities assert, the personal liability of the owner is not an element in determining the liability of a vessel in *rem* for wrongs or torts, the decisions in *The Bordentown* and *The Columbia*, so far as they were based upon the contrary consideration, were erroneous. The observations in those cases to the effect that the two vessels were to be regarded as one for the purposes of the joint undertaking have not the remotest bearing upon the question of their respective liabilities in *rem*. A tug and her tow are deemed

a single vessel under steam within the meaning of the rules of navigation for preventing collisions; but it has never been asserted elsewhere that they could be regarded as one vessel for the purpose of ascertaining their relations as between themselves or their several liabilities to respond for the consequences of a fault of one of them. Even when the two vessels are lashed together, the question of the liability of each always depends upon ascertaining whether that vessel was in fault."

It is undoubtedly true that the personal liability of the owner is not a determining factor as to the liability of a vessel in *rem*. We also agree that the fact that the two vessels are to be regarded as one for the purposes of a joint undertaking of their owner may have no bearing upon the question of their respective liability in *rem*. But neither of these considerations has any bearing upon the question of what must be surrendered by a respondent as a condition of limiting his liability. There may be no liability whatever in *rem*, and yet the ship owner may be entitled to limit his liability by surrendering the vessel which was concerned in the disaster. This is illustrated by *The Hamilton*, 207 U. S. 398, where the ship owner was allowed to limit his liability for death claims on account of which no liability in *rem* exists. Another illustration is the case of *Richardson v. Harmon*, 222 U. S. 96, where there was not only no liability in *rem* for the damages occasioned by a vessel to a bridge, but the tort was not even maritime in its nature.

It is clear that the actual decision in the *Mason* case, *supra*, was simply that while the two tugs were engaged in towing the steamship, they were

acting in independent capacities. This is made clear by a later decision of the same court in *The Anthracite*, 168 Fed., 393, where two tugs acted jointly in towing a barge which was brought in contact with a rock by negligent steering. In a suit in *rem* both tugs were held responsible, though one of them, lashed alongside the other, with a hawser of her own to the tow, acted only as a helper, her master submitting her entirely to the commands of the master of the other. The decision in *The W. G. Mason*, *supra*, was distinguished on the ground that there was independent action in that case, while in the instant case there was not.

In *The Transfer No. 21*, 248 Fed., 459, the same court considered for the first time a state of facts substantially similar to the case at bar. That was a limitation proceeding where a carfloat on the port side of the tug *Transfer 21* (which had another float on the starboard side) collided with a motor boat. A motion was made to dismiss the limitation proceeding because the petitioner had not offered to surrender the two carfloats as well as the tug. Although on the merits the court found no fault on the part of the tug, the ruling of the court below denying the motion to dismiss was sustained:

"A tug and tow are for some purposes regarded as a single vessel, as, for example, in connection with the steering and sailing rules; but in this circuit the petitioner in limited liability proceedings is required to surrender only the vessel or vessels at fault. A tow without motive power, alongside a tug and moved by it, cannot be at fault. In the case of *The Bordentown* (D. C.), 40 Fed., 682, Judge Addison Brown required the claimant to surrender, not only the tug *Bordentown*, which was in charge of the navigation of

the tow and at fault for proceeding in threatening weather, but also the helper tug *Winnie*, because she supplied part of the motive power and was acting under the orders of the master of the *Bordentown*. This court, in the subsequent case of *The W. G. Maxon*, 142 Fed., 913, 74 C. C. A., 83, said that, if the decision in the *Bordentown* was based upon the consideration that the personal liability of the owner was conclusive of the liability of the *Winnie in rem*, it was erroneous. So in this case the petitioner, as owner of *Transfer No. 21*, may be in fault, and so liable to her value, but it is not in fault as owner of the floats, because neither of them did or could do anything whatever either to cause or prevent the collision."

In other words, the principle underlying the action in *rem* is applied in limitation proceedings. The result is that in the Second Circuit the owner of two or more vessels engaged for profit in a particular adventure may limit his responsibility for the damage done by them to the value of one. Although the liability is said to be strictly as in *rem*, the result may be, as in the case at bar, that the vessel which physically did the damage is not required to respond either in itself or through its owner; while another vessel, which was not actually in collision at all, is held solely liable for the fault of its navigator. Yet, according to the same court's decision in *The Anthracite*, 168 Fed. 393, it is sufficient that the navigator of a vessel is actually directing her movements; it is not necessary that he shall be technically master, or, indeed, aboard. But the master of a tug which has a carfloat, without motive power, lashed by it, is certainly the only person who has any control over its movements.

The respondent contends, and the District Court of Maryland has recently held in an unreported case, that the rule prevailing in the Second Circuit is more in harmony with the decision of this court in the *Eugene F. Moran*, 212 U. S. 466. In that case this court refused to extend the fiction of the personification of a vessel to the situation where a tow was being navigated by an independent contractor. The court proceeded upon the ground that the ship could not be charged with faulty navigation when neither its owner nor its servants were in any way responsible. Mr. Justice Holmes said:

"No doubt the fiction that a vessel may be a wrongdoer and may be held, although the owners are not personally responsible on principles of agency or otherwise, is carried further here than in England * * * But after all a fiction is not a satisfactory ground for taking one man's property to satisfy another man's wrong, and it should not be extended. There is a practical line and a difference in degree between the case where the harm is done by the mismanagement of the offending vessel and that where it is done by the mismanagement of another vessel to which the immediate but innocent instrument of harm is attached."

Of course, it is fairly arguable that if the two vessels belonged to different owners, so that the fault of the tug might be likened to the negligence of an independent contractor, the fiction that a vessel itself may be a wrongdoer and liable in *rem*, despite absence of negligence on the part of the owner, affords an unsatisfactory ground for taking one man's property to satisfy another man's wrong. It is obvious that the court, in speaking of the immediate but innocent instrument of harm, had in mind cases where the in-

nocence was due to the fact that the owner was not navigating his own vessel, but had submitted it as a tow to the management of the owner of the towing vessel for the time being under a towage contract, and the negligence was solely on the part of the towing vessel; so that the situation was like the ordinary case in which a person is exempt from responsibility for the negligence of an independent contractor. Where, however, the two vessels, as tug and tow, belong to the same owner, the objection that an application of the fiction would result in the taking of a man's property for the wrong of another does not apply; and there is good reason for holding both his vessels liable for the damage occasioned by the wrongful manner in which he himself manages his own vessels where both are involved in the mismanagement.

This court has held that the limitation statute, being in derogation of the common law rights of the claimant, is to be construed strictly against the shipowner.

"As the object of the statute was to curtail the amount that would otherwise be recoverable, it should not be construed to abridge the rights of the owner of the injured vessel to a greater extent than its language will fairly warrant" (*The Maia v. Williams*, 152 U. S., 122).

Congress intended only to protect an owner from losing all his property in a single disaster. It limited his liability to the property engaged in the adventure in which the disaster occurred. It was clearly not the intention of Congress to single out a particular portion of the property engaged in an adventure and limit the owners' liability to such portion. There is

therefore no rational ground for separating the motive power from the remainder of this flotilla, joined together and navigated as one by its owner, and for holding the motive power of the mass to be the only part answerable for the owner's negligent navigation of the whole. It is the owner's liability that is limited by the statute, and when he joins several vessels owned by him and navigates them as a solid mass, precisely as a single vessel, there is no justification for his asking the court to undo what he has done for his own convenience, and to judge the component parts of the mass by rules applicable where different owners are involved. While car-floats and tug belonging to one owner are lashed together and navigating public waters as a unit under his sole control, there is no reason for viewing the component parts of the combined mass as independent vessels, rather than as a single vessel, merely because, for economy and convenience of the owner, the mass is a temporary as distinguished from a permanent combination. Every consideration of justice requires that the mass should be viewed as one craft, as the owner has made it, when he seeks a limitation of his liability for damage occasioned by the manner in which he has navigated the combination.

It is respectfully submitted that the decree should be modified so as to require the respondent to surrender the entire flotilla in limitation of its liability.

VAN VECHTEN VEEDER
 CHARLES C. BURLINGHAM
 For Libellant-Appellant.



Office Supreme Court, U. S.

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Supreme Court of the United States

OCTOBER TERM, 1919—No. 81

VERPOOL, BRAZIL AND RIVER PLATE STEAM
NAVIGATION COMPANY,

Libellant-Petitioner,

against

BROOKLYN EASTERN DISTRICT TERMINAL,

Respondent.

BRIEF FOR RESPONDENT

SAMUEL PARK,

HENRY E. MATTISON,

for Respondent.

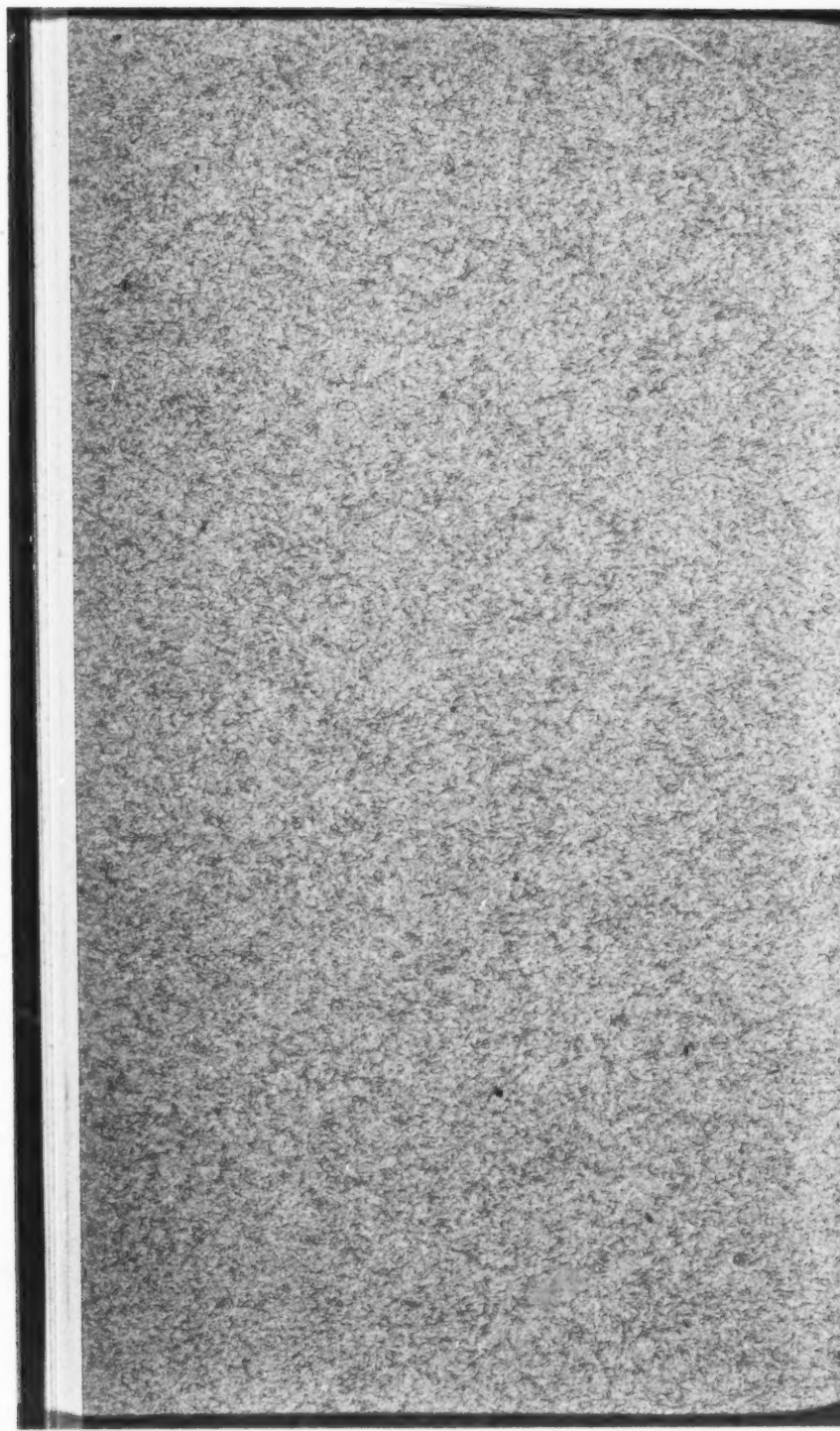


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Supreme Court,

OF THE UNITED STATES.

Liverpool, Brazil and River
Plate Steam Navigation Com-
pany,

Libellant-Petitioner,

against

Brooklyn Eastern District
Terminal,

Respondent.

October term,
1919.

No. 81.

BRIEF FOR RESPONDENT.

Statement of Facts.

At the times hereinafter mentioned the Brooklyn Eastern District Terminal was engaged in the transportation of merchandise in the Harbor of New York. For that purpose it owned and employed various steamtugs, carfloats and barges. On April 29, 1914, the steamtug "Intrepid", owned and operated by the respondent, took in tow at Jersey City, lashed to its port side, the carfloat No. 2, laden with cars, owned by the respondent, and the steamtug "Industry", also owned by the respondent, lashed to the starboard side of the "Intrepid", bound for Williamsburg. The "In-

dustry" was out of commission, had no steam on her boilers and was being towed to the Company's piers at Williamsburg. The "Intrepid" had sole charge of the navigation. While proceeding up the East River, close to the Brooklyn shore, in order to pass a steamtug approaching her from the opposite direction the wheel of the "Intrepid" was ported; in consequence thereof the stern of the tow was in the flood tide and the bow of the carfloat, which projected a considerable distance ahead of the steamtug "Intrepid", was in slack water, and the "Intrepid" was unable to check her starboard sheer in time to prevent collision with the steamship "Vauban", which was lying on the south side of Pier 8, Brooklyn, bow in, and with her stern only a few feet inside the end of the pier, the bow of the carfloat "No. 2" coming in contract with the stern of the said steamship. Subsequently, a libel *in personam* was filed in the United States District Court for the Southern District of New York by the owner of the steamship against the Brooklyn Eastern District Terminal for the damages resulting from said collision. Answer was filed by the respondent admitting negligence in the navigation of the steamtug "Intrepid" (Answer, Article 4, Record, p. 6, fol. 23). The answer further alleged that the Brooklyn Eastern District Terminal carfloat "No. 2" and the steamtug "Industry" were in tow and under the control of the said steamtug "Intrepid" and depended entirely upon the said steamtug "Intrepid" in their navigation (Record, p. 8, fol. 31). The answer further alleges that the damages alleged to have been sustained by the collision were greatly in excess of the value of the respondent's interest in said steamtug "Intrepid" and that

the said collision happened, and the loss, damage and injury were done, occasioned and incurred without the privity or knowledge of the respondent, and the respondent claimed the benefits of, the provisions of Sections 4283, 4284 and 4285 of the Revised Statutes of the United States and the Acts amendatory thereof and supplemental thereto (P. 8, fol. 32). An exception was filed by the libellant to the answer, as stated in the statement of facts in appellant's brief. Exception was overruled and in due course the case was heard before Judge Hough, Circuit Judge, sitting in the District Court, and a decision was rendered holding that the navigating vessel—the steamtug “Intrepid”—only need be surrendered by the respondent (Record, p. 26, fol. 101). The decree of the District Court was affirmed upon appeal without opinion and the libellant's motion for certificate denied (Record, fols. 141, 144).

The only question presented for the consideration of this court is whether the respondent, as owner of the flotilla, in order to obtain the benefits of the Statute should surrender all the vessels comprising the flotilla instead of the steamtug “Intrepid”, the offending vessel.

Argument.

I.

Up to the time of the enactment of the Statute limiting the liability of ship owners to the amount or value of the interest of such owner in such vessel and her freight then pending, vessel owners in the United States were greatly handicapped

in the conduct of their maritime operations, the cause of the fact that all or nearly all of the maritime countries in Europe limited the liability of a ship owner for losses arising without the privity or knowledge of the owner. At a period too remote for authentic research a custom prevailed in all of the maritime countries of Continental Europe exempting a vessel owner beyond his interest in the vessel for losses occurring without his knowledge or privity and this custom became the law of such Countries. In order to remove this burden upon vessel owners of the United States, and to encourage ship building and maritime pursuits, the Statute limiting the liability of ship owners to an amount not exceeding their value in the vessel and freight then pending was enacted, and from the time the operation of the Statute has been a part of the Public Policy of the United States.

"The act was designed to promote the building of ships and to encourage persons engaged in the business of navigation and to place that business in this country upon a footing with England and the Continent of Europe."

Moore v. American Transportation Co.
24 How. p. 39.

In view of the opinion of Mr. Justice Brandeis in the case of *The Main v. Williams*, 152 U. S. p. 122, at p. 126, containing a historical review of the growth of the Limited Liability Law, any further statement in that regard would be an act of supererogation.

Appellant's contention in this case is that the whole flotilla should be regarded as a unit; that

it was an adventure in which the respondent was engaged, and that all the property employed by the respondent as owner in the adventure should be subjected to the payment of the loss arising on said voyage; though only one vessel of the flotilla is an offending thing the other vessels comprising the flotilla should be surrendered in order that the respondent may obtain the benefits of the Limitation of Liability Statute. Since the passage of the Act this question has arisen comparatively but a few times, notwithstanding the many collisions which have occurred since the passage of the Act. The adjudications upon this point, considering the extent of losses upon the sea, are few. One of the earlier cases relied upon by the libellant, is *The Bordentown*, 40 Fed. Rep. 682, a decision by Judge Addison Brown, Southern District of New York, affirmed by the Circuit Court of Appeals, without opinion. In that case the steamtugs "Bordentown" and "Winnie," belonging to the same owner, were engaged in towing a flotilla of boats across the Upper Bay of New York. The fault alleged and found was proceeding out in the Bay in the condition of weather then existing. Both of the steamtugs were actually engaged in towing the flotilla.

Bearing in mind that neither the "Industry" nor the carfloat "No. 2," had motive power of their own, the language of Judge Addison Brown in *The Bordentown* case invites attention,

"Where all the tugs *employed* belong to the same owner, and are under one common direction, they are in the same situation, as it seems to me, as a single vessel, as respects responsibility for the negligence of the com-

"mon head. The words 'such vessel' in Section 4283 embraces all *such* tugs and all such "must respond for the damages in the proceedings for Limitation of Liability."

If the *Winnic* had been without motive power and had been lashed alongside the steamtug *Bordentown*, or alongside the tow, we cannot believe Judge Brown would have held, on account of the same ownership, that the *Winnic* should have been surrendered in limitation proceedings. The *Winnic* was an active participant in the movement of the flotilla and was held by Judge Brown because she was an active participant in the movement of the flotilla. There was a third tug which had been engaged in the moving of the flotilla, *The Willie*, of the same ownership, and Judge Brown held that she need not be surrendered because at the time when the real fault in the case was committed in going out into the Bay, she was no part of the moving power. *The Bordentown*, *supra*, 687.

The construction of the Statute relative to the situation presented in this case was before the United States Circuit Court of Appeals, Second Circuit, in the case of *The W. G. Mason*, 142 Fed. Rep. p. 913, Judge Wallace writing the opinion. In that case a steamship was being towed by two tugs from her dock through a narrow channel. The two tugs belonged to the same owner. The master of the leading tug directed the movement of the ship. The other tug, which was astern of the steamship, assisted in moving the ship, and was under the control of her own master. It was held that only one tug, the one at fault for the damage, need be surrendered. The opinion discusses with

lucidity other decisions involving the question presented in this case. It is urged however, that the decision of the *The Anthracite*, 168 Fed. Rep. p. 693, Circuit Court of Appeals, Second Circuit, in which both steamtugs were held responsible, though one was a helper, limits the application of the decision in the case of *The W. G. Mason*, to tugs acting in independent capacities. In *The Anthracite* case, Judge LaCombe writing the opinion, states:

"We concur with the District Court in the conclusion that the facts in that case (The *Mason*) differ so much from those in the case at bar that the decision above stated is not controlling."

This Section of the Statute was again before the Circuit Court of Appeals, Second Circuit, in the case of *The Transfer No. 21*, 248 Fed. Rep. 439. That case involved carfloats lashed to the side of a steamtug and the court held the petitioner, as owner of the *Transfer No. 21*, the steamtug to be in fault, and so liable to her value, but not in fault as owner of the floats, because neither of them did or could do anything whatever either to cause or prevent the collision.

The Circuit Court of Appeals, for the First Circuit, in the case of *The Coastwise*, 233 Fed. Rep. p. 1, at page 4, involving the construction of the Harter Act, held that a tug, and a barge in tow, laden with coal, the tug and barge the property of the same owner, did not constitute a single vessel, and further held:

"There is nothing to indicate an attempt to combine the tug and barge into a single maritime adventure. The general rule is stated by the Circuit Court of Appeals, in the Second Circuit, in the *W. G. Mason*, where in speaking for the court Judge Wallace said:

'A tug and her tow are deemed a single vessel under steam within the meaning of the rules of navigation for preventing collisions; but it has never been asserted elsewhere that they can be regarded as one vessel for the purpose of ascertaining their relations as between themselves or their several liabilities to respond for the consequences of a fault of one of them. Even when two vessels are lashed together, the question of the liability of each always depends upon ascertaining whether that vessel was in fault.'

"Upon the proofs in the case at bar, and upon the facts found correctly by the District Court, it is clear, and we must hold that, within the meaning of the Harter Act "the tug and the barge were not one entity "and the tug *Coastwise* was not transporting "merchandise or property."

This section of the Statute involving same ownership was before the United States District Court, Eastern District of New York, in the case of *Van Eyken v. Erie Railroad Co.*, 117 Fed. Rep. p. 717, and Judge Thomas held:

"The remaining question relates to the necessity of surrendering barge No. 9 in addition to the tug. The libellant suggests upon the theory that the barges and tug formed a common united instrument of commerce, moving as an entirety when the tort was committed, although afterwards separated in the successive collisions. * * * The presence of the barges was a part of the conditions under which the wrongful act or omission took effect. It was not a part of the wrongful act. Therefor, it is concluded that the respondent may limit its liability upon surrendering the tug."

Another case upon this point is that the *Erie Lighter 108*, 250 Fed. Rep., p. 490, at p. 497. That was a case of personal injuries, in which Judge Haight, District of New Jersey, held:

"As the decedent's injuries were in no respect proximately due to any fault of the tug, or those in charge of her operation, but wholly to a structural defect in the lighter, I have no doubt that the petitioner's liability should be limited to the value of the latter vessel, referring to the case of *Van Eyken v. Erie Railroad Co., The W. G. Mason and the Sunbeam*. If the decision of the Circuit Court of Appeals, of the Sixth Circuit, in *Thompson Towing & Wrecking Association v. McGregor*, 207 Fed. Rep. 209, is at variance with this conclusion, I do not think that that case can well be reconciled with the decisions of the Circuit Court of

"Appeals of the Second Circuit, above cited.
 "The latter, I think, present the view which
 "is more in harmony with the spirit in which
 "the Supreme Court has many times held that
 "the Limited Liability Act should be con-
 "strued, referring to *Providence & New York*
 "*Steamship Company vs. Hill Mfg. Co.*, 109
 "U. S., 589; *Butler v. Boston SS Co.*, 130
 "U. S. 549; *Richardson v. Harmon*, 222 U. S.
 "104; *LaBourgogne*, 210 U. S. 95, 120. To
 "hold that a tug and lighter must be surrend-
 "ered in order that the owner of both may
 "limit his liability for an injury received by
 "an employee on board the lighter, due en-
 "tirely to a defect in the latter, would seem
 "to do violence to the language of the Statute,
 "and the rule of construction as pronounced
 "by the Supreme Court. The Statute limits
 "the owner's liability to the value of his in-
 "terest in such vessel and her freight then
 "pending. This must mean the vessel or
 "vessels which caused the injury, etc. The
 "offending vessel in this case was the lighter
 " * * * It alone was legally responsible."

The construction of the Statute was recently
 before Judge Rose, District of Maryland, in the
 unreported case of *The Begona II*, *The Mary P.*
Richl, the *Carfloat I*, decided May 15, 1919. In
 that case a tug and carfloat, belonging to the same
 owner, were in collision with a ship, and Judge
 Rose held:

"What the Supreme Court said and held in
 "The *Eugene F. Moran*, 212 U. S., 466, seems
 "more in harmony with the practice of the

"Second Circuit then that prevailing in the
 "Sixth and Ninth Circuits. It follows that
 "the owner of tug and float may limit its
 "liability to the value of the former."

In the case of *The Sunbeam*, 195 Fed. Rep. 470., United States Circuit Court of Appeals, Second Circuit, decided in 1912, involving the question of same ownership, the court held:

"The fact that the Skylight and Howard and
 "twelve light boats and a naphtha launch
 "were also owned by O'Brien Brothers does
 "not make those boats liable or require their
 "owner to surrender them under the limita-
 "tion liability suit. They were guilty of no
 "fault. The sole negligence charged was that
 "of the *Sunbeam*. No negligence is alleged
 "against the other boats and we are unable to
 "discover any reason for holding them liable.
 "The fact that they were in the immediate
 "vicinity is not enough. They must be
 "shown to be guilty of a fault that caused
 "or contributed to the accident."

An examination of the opinion delivered by the Circuit Court of Appeals, Sixth Circuit, in the case of the Thompson Towing & Wrecking Association v. McGregor, 207 Fed. Rep. p. 209, shows, that an attempt was made to compel the surrender of all boats engaged in the undertaking belonging to the appellant. This application was denied and the Circuit Court of Appeals state at page 212:

“It is true that he sent other boats to engage
 “in the same operation, but the effort to force
 “either the surrender of those boats, or the
 “giving of a stipulation covering their value
 “failed.”

And again at Page 213:

“It is strongly urged by counsel that to hold
 “The Merrick would be to establish a rule
 “that would be most injurious to the shipping
 “interests of the Great Lakes. The reason
 “assigned is stated in the margin. The most
 “obvious answer to this complaint is that,
 “although the appellants furnished at least
 “four vessels to release the Elwood, the effort
 “made in the court below, as we have already
 “said, to hold any of them except the Mer-
 “rick and the Stewart failed. We should add
 “that the appellees sought also to have the
 “Elwood and her cargo held, but the appli-
 “cation was denied.”

And in relation to the decision in The Mason
 case, the said court said at Page 214:

“Again, we think it is to be fairly to be in-
 “ferred from the opinion in the Mason Case
 “that, while the steamtugs, the Mason and
 “the Babcock, were engaged in towing the
 “steamship Gratwick, they were acting in
 “independent capacities and so did not pre-
 “sent the fact which is controlling here; and
 “of this Judge Wallace said (142 Fed. 918,
 “74 C. C. A. 88):

'If the liability of the owner for the tort
'or wrong of a vessel, arising from the
'misconduct or negligence of her master or
'crew, could be enforced against another
'vessel belonging to the same owner, when-
'ever she might happen to be engaged in the
'same enterprise with the other vessel,
'though acting in an independent capacity,
'and under the control of her own master
'and crew, in performing her own part of
'it, the spirit and meaning of the Statute
'limiting the liabilities of vessel owners
'would be disregarded.' "

In fact the decision of the court states specifically in order to distinguish it from the *Mason* and other cases of like tenor as follows, at Page 214:

"The particular feature, then constantly to be
"borne in mind here is the mutual dependence
"of the *Merrick* and the *Stewart*, in the work
"of releasing the *Elwood* * * * We think
"this fact alone brings this case within the
"principles of the decisions relied on in the
"opinion below and distinguishes it from the
"cases claimed to be opposed to it."

The decisions in the Ninth Circuit, *The Columbia*, 73 Fed. 226, *Ship owners and Merchants Tugboat v. Hammond Lumber Company*, 218 Fed. 161, held that a tug and her tow of the same ownership are for the purposes of the voyage considered one vessel. These decisions rest upon the unitary principle that a vessel and her tow for the purpose of the voyage are to be consid-

ered as one vessel, engaged in a Maritime venture.

In the case of *The Columbia*, *supra*, Judge L. Ford, of the District Court of Oregon, granted the petitioners a limitation of liability with the surrender of the tug which had the barge tow.

II.

A tug and her tow cannot be regarded as one vessel for the purpose of ascertaining their relative liabilities to respond for the consequences of a fault of one of the

Justice Story, in the case of *United States v. Brig Malck Adhel*, 2 How. 210, held:

"It is not an uncommon course in the admiralty, acting under the law of Nations to treat the vessel in which or by which or the master or crew thereof, a wrong or offense has been done, as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof."

In the case of *The China*, 7 Wall. 53, it was held the liability of the vessel in rem for the loss of a compulsory pilot was upon the ground that the responsibility of the vessel for the loss committed by it was not derived from the law of the master or servant, or from the common law, but from maritime law, which im-

a maritime lien upon the vessel in whosoever hands it might be for torts committed by it.

And in *Ralli v. Troop*, 157 U. S. p. 402, this court re-states that the decision in *The China* case proceeded, not upon any authority or agency of the pilot, derived from the civil law of master and servant, or from the common law, as the representative of the owners of the ship and cargo; nor upon the law of contribution in general average as between them; but upon a distinct principle of the maritime law, namely, that the vessel, in whosoever hands she lawfully is, is herself considered as the wrongdoer, liable for the tort and subject to a maritime lien for the damages.

And this court approved the language used in the argument of Mr. Evarts in his argument:

"This theory treats the faults of conduct in
"the vessel's navigation as imputable to the
"vessel itself, and discards as immaterial all
"considerations touching the *adjustment*
"among the navigators, or between them and
"the owners, of the personal fault or personal
"responsibility of the misgovernment of the
"vessel."

In the case of *Owner of Brig "James Gray" v. Owners of Ship "John Fraser"*, *et al*, 62 U. S. at p. 194, this court said:

"It is true, that the *John Fraser* was the *res*
"or thing which struck the "*James Gray*," and
"did the damage. But the mere fact that
"one vessel strikes and damages another, does
"not of itself make her liable for the injury;
"the collision must in some degree be occas-
"ioned by her fault."

The Carrie L. Tyler, Circuit Court of Appeals, Fourth Circuit, 106 Fed. Rep. at p. 425.

In this case a barge in tow of a steamtug was libelled for pilotage. The tug and tow were not of the same ownership. The tug had a United States Licensed pilot on board. Judge Simonton, writing the opinion, states:

"It is said, however, that the tug and tow are, "in contemplation or law, one vessel, and that "one under steam, thus giving to the combination the character of the tug. So they are "for some purposes. They are governed by "the International Rules applicable to vessels "approaching each other, and must observe "the regulations applicable to steam vessels.

The Civitta and The Restless,
103 U. S. 699.

"But they are so far distinct from each other "that, if a collision takes place, the tug can "be held liable to the exoneration of the tow.

The James Gray v. The John Fraser,
21 How. 184.

And at Page 426:

"It seems, therefore, that a tug and her tow "are not one vessel, except under certain "peculiar circumstances, such as approaching "a vessel whose movements are not controlled "by same."

The owner of the Steamship "Vauban", in the present case, could have proceeded in an action in rem against the offending vessel the "Intrepid," which produced the collision. The mere fact that this action is in *personam* can in no way affect the construction of the Statute as respects the respondent's liability. The respondent's liability is predicated upon the fact that the steamtug "Intrepid", owned by it, through the negligence of her master was at fault for the collision, and in consequence thereof a maritime lien was at once impressed upon said steamtug as security for the damages produced by the collision. No maritime lien would be impressed upon a vessel not at fault.

In the case of *Sturgis v. Boyer, et al.* 65 U. S. at p. 122, this court held:

"But whenever the tug under the charge of her own master and crew, and in the usual and ordinary course of such an employment, undertakes to transport another vessel, which, for the time being, has neither her master nor crew on board, from one point to another, over waters where such accessory motive power is necessary or usually employed, she must be held responsible for the navigation of both vessels; and third persons suffering damage through the fault of those in charge of the vessels must, under such circumstances, look to the tug, her master or owners, for the recompense which they are entitled to claim for any injuries that vessels or cargo may receive by such means. Assuming that the tug is a suitable

"vessel * * * the tow, under the circumstances supposed, is no more responsible for the consequences of a collision than so much freight."

In the *John G. Stevens*, 170 U. S. at p. 122, a case of negligent towage, this court said:

"The offending ship is considered as herself the wrongdoer, and is herself bound to make compensation for the wrong done. The owner of the injured vessel is entitled to proceed *in rem* against the offender, without regard to the question who may be her owners, or to the division, the nature or the extent of their interests in her. With the relations of the owners of those interests, as among themselves, the owner of the injured vessel has no concern."

In the case of *The Eugene F. Moran*, 212 U. S. p. 466, which involved a collision in the Hudson River, between the tows of two steamtugs, Mr. Justice Holmes, whiting the opinion of the court, states at Page 475:

"On the other hand, although not to be regarded as a unit simply because they were tied together, the offenders severally are subject to a lien by the established principles of the proceeding *in rem*. * * * Although even the admiralty does not attempt to go far into the quantification of damages, it is not an unreasonable supposition that on an average the owner of two vessels, each contributing in a wrongful result, will contribute

"twice as much toward producing it as if he
 "had owned only one. If the second scow had
 "been owned by another it would have had
 "to pay its share. It is contrary to the theory
 "of these proceedings to allow ownership to
 "affect the case. We are of the opinion that
 "the District Court was right in dividing the
 "damages equally among the guilty vessels in
 "the first suit."

Again at Page 476 the court says:

"The question arises, therefore, whether the
 "duty to give warning by a light was imposed
 "upon 18 D for any other purpose than to
 "prevent collision with itself. If not, then as
 "the boats are dealt with as individuals and
 "not as parts of a single whole, we do not
 "see how the absence of a light on 18 D can
 "be said to have contributed to the loss."

In the above case two of the boats in tow in-
 volved the same ownership and damages were
 assessed against each of said boats as an indiv-
 idual, as each concurred in a wrongful act.

Applying the principles as stated in the case of
 The Eugene F. Moran, *supra*, to the facts of the
 present case, the "Intrepid" and her tow are not
 to be regarded as a unit other than relating to
 rules of navigation, and the respondent has fully
 complied with the Statute in surrendering the
 steamtug "Intrepid." If the boats in the flotilla
 are dealt with as individuals and not as parts of
 a single whole, the decision in the case of The W.
 G. Mason, *supra*, is correct.

The Merchant Shipping Act, Amendment Act of 1862, extended the provisions of the prior acts of England to foreign as well as British ships, and to cases of loss of life or personal injury, as well as damage or loss to the cargo, and provided that the owners should not be liable in damages except for loss of life or personal injury, "to an aggregate amount exceeding fifteen pounds for each ton of their ship's tonnage," nor in respect of loss or damage to ships or their cargoes to an amount exceeding eight pounds per ton. The statute of England in this respect limits the liability of the owner to his interest in the ship and freight for the voyage for damages occasioned without his privity or knowledge.

The Main v. Williams, 152 U. S. p. 127.

The case of *The American* and *The Syria* before the Judicial Committee of the Privy Council involved the English Statute of limited liability. II Aspinall Reports of Maritime Cases, N. S. page 350. L. R. 6 P. C. 127. The facts of that case briefly stated are as follows: The steamship "Syria" was in tow on a hawser of the steamship "American," the steamships belonging to the same owner, The Union Steamship Company, Limited; the said "American" and her tow, the "Syria," came in contact with the sailing ship "Aracan," in consequence of which the sailing ship shortly afterwards sunk. A suit was instituted by the owner of the "Aracan" against the steamship "American" and the steamship "Syria" and also against the Union Steamship Company. The value of the "American"

being insufficient to respond to the damages sustained by the sailing ship "Aracan", *supra*, p. 358, Sir. R. Phillimore, sitting in the High Court of Admiralty, held that both steamships must respond for the damages, holding, "But on reflection, I think this distinction does not affect the case, whether the governing power be in the towed vessel, as according to the judgment just referred to it would usually be, or whether it be in the vessel which was by towing performing an act of salvage, in either case I think the two vessels must be considered one in the present instance."

This decision was predicated upon the almost uniform practice in the English courts holding in relation to tug and tow, or one steam vessel towing another vessel, that the motive power is in the vessel towing and the governing power is in the vessel that is towed, a distinction which rarely prevails in this country. On appeal to the Judicial Committee of the Privy Council three of the reasons of appeal were as follows:

First: Because the *American* and the *Syria* were, in law as well as in fact, two separate ships and not one ship.

Second: Because the question whether-or-not the *Syria* is to blame, must be determined altogether without regard to the circumstance that the *American* and the *Syria* belonged to the same owners.

Third: Because the "Syria" did not contribute to the loss of the "Aracan" and did not cause any damage to the respondent's.

Upon appeal the judgment of the court was delivered by Sir R. P. Collier. Referring to the decision of Sir R. Phillimore, Sir R. P. Collier writing says:

"The decision of the learned Judge (Sir R. Phillimore) upon this point appears to be based upon the principle shortly stated by Lord Kingsdown in the passage which has been before cited as that upon which The Cleadon (14 Moore, 97) was decided, viz, that the motive power was in the tug, the governing power in the ship towed, the Judge of the admiralty court applying this principle to the present case held, that the *American* and the *Syria* constituted one vessel in intentment of law. This is no doubt an accurate representation of the relations usually subsisting in this country between a tug and a tow." * * *

"It appears that, in the large American rivers and lakes, it is usual for a tug, which is spoken of as a public vessel, to take a number of small vessels in tow, some alongside of her, some astern. She assigns to each of these vessels its place, and they are under her direction. Under these circumstances, the American courts have held that a vessel towed is not liable for the negligence of the tug because the governing power is in the tug and not in her." * * *

"There is no evidence of his (the American's master) having been hired by the captain of the *Syria* or having acted in any way under the captain of the *Syria's* con-

"trol. On the contrary it would appear
 "that the governing power was wholly with
 "the *American*. Under these circumstances
 "their Lordships are of opinion that the
 "principle on which the *Cleadon* was deci-
 "ded does not apply to this case; that the
 "*Syria* cannot be deemed in intentment of
 "law one vessel with the *American*, or liable
 "for her negligence. *Nor do we think that*
 "*the fact of the American and Syria belongs*
 "*to the same owners affecting the question*
 "*whether or not the Syria was to blame.*"
 [The italics are ours.]

The *American* alone was held responsible for the damages, reversing the decision of the High Court of Admiralty.

In the present case the steamtug "Intrepid" was not only the motive power but she was the governing power and the master of the "Intrepid" had absolute charge of the make up of the tow and its entire navigation.

III.

The limited liability statute is part of the public policy of the United States and should be executed so as to encourage commercial operations.

*Providence & New York Steamship Co.
 v. Hill Mfg. Co.* 109 U. S., p. 589.

The La Bourgogne, 210 U. S. at p. 121;
 "In these provisions of the statute we have
 "sketched, in outline, a scheme of laws and
 "regulations for the benefit of the shipping
 "interest, the value and importance of which
 "to our maritime commerce can hardly be
 "estimated. Nevertheless, the practical value
 "of the law will largely depend on the manner
 "in which it is administered. If the courts
 "having the execution of it administer it in
 "a spirit of fairness, with the view of giving
 "to ship-owners the full benefit of the im-
 "munities intended to be secured by it, the
 "encouragement it will afford to commercial
 "operations, as before stated, will be of the
 "last importance; but if it is administered
 "with a tight and grudging hand, construing
 "every clause most unfavorably against the
 "ship-owner, and allowing as little as possible
 "to operate in his favor, the law will hardly
 "be worth the trouble of its enactment. Its
 "value and efficiency will also be greatly
 "diminished, if not entirely destroyed, by
 "allowing its administration to be hampered
 "and interfered with by various and con-
 "flicting jurisdictions."

It is respectfully submitted that the decree
 should be affirmed.

SAMUEL PARK
 HENRY E. MATTISON
 for Respondent.

Supreme Court of the United States.

LIVERPOOL, BRAZIL & RIVER
PLATE STEAM NAVIGATION
COMPANY,

(Libellant-Appellant)
Petitioner,

against

BROOKLYN EASTERN DISTRICT
TERMINAL,
(Respondent-Appellee),
Respondent.

No.
October
Term,
1917.

BRIEF FOR RESPONDENT.

POINTS.

I.

The decision of the Circuit Court of Appeals for the Second Circuit is consistent with the decision of this Court in the case of the "Eugene F. Moran", 212 U. S. 466.

The petitioner claims the petition should be granted because of conflicting decisions between the Circuit Court of Appeals for the First Circuit and the Sixth and Ninth Circuits. We respect-

fully submit that the decision of this Court in the case of the Eugene F. Moran, *supra*, forecloses further controversy upon this point.

The language of Section 4283 in relation to the liability of the ship owner is

"The liability of the owner * * * for any injury by collision * * * done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending."

The leading case in the Second Circuit upon the point in question is *The W. G. Mason*, 142 Fed. Rep., p. 913, a decision of the Circuit Court of Appeals, the opinion being written by Judge Wallace:

"If the liability of the owner for the tort or wrong of a vessel, arising from the misconduct or negligence of her master or crew, could be enforced against another vessel belonging to the same owner, whenever she might happen to be engaged in the same enterprise with the other vessel, though acting in an independent capacity, and under the control of her own master and crew, in performing her part of it, the spirit and meaning of the statute limiting the liabilities of vessel owners would be disregarded. The statute incorporates into the law of this country the rule of liability which was administered as a part of the general maritime law by the courts of continental Europe, and was adopted in England by the Acts of 26 and 53 George III, and by which the liability of the owner for all torts of the master and seamen in charge of the navigation of his ship was limited to the value of

"his ship and freight. * * * To subject both vessels in a case like the present to liability *in rem* would make the owner responsible for a fault committed without his privity or knowledge beyond the value of the ship in fault."

The opinion of Judge Wallace refers to many cases bearing upon this question and we refer to that opinion as our brief upon this point.

In the case of The "Connecticut", 103 U. S., p. 710, at p. 712, this Court says:

"So far as the Stevens is concerned, she was clearly not to blame. She was the mere servant of the 'Connecticut', and could exercise no will of her own. She was bound to obey orders from the 'Connecticut' and no part of the responsibility of the navigation, so far as the approaching vessel was concerned, was on her. It was not her duty to signal the movements of the 'Connecticut', under whose exclusive control she was. The 'Connecticut' is alone responsible for the consequences of her faults."

In the "Eugene F. Moran", *supra*, claim was made that a tug and her tow should be regarded as a navigable unit and it was held by this Court at p. 475:

"On the other hand, although not to be regarded as a unit simply because they were tied together, the offenders severally are subject to a lien by the established principles of the proceeding *in rem*."

In that case two of the boats involved the same ownership and this Court held, at the bottom of p. 475:

"It is contrary to the theory of these pro-

"ceedings to allow ownership to affect the "case."

All of the boats, tugs and tow, which had actively participated in the fault were condemned irrespective of ownership.

At the middle of p. 476, the Court said:

"* * * then as the boats are dealt with "as individuals and not as parts of a single "whole, we do not see how the absence of a "light on 18 D can be said to have contributed "to the loss."

While the limitation of liability statute was not involved in the case of the "Eugene F. Moran" it is clear that a tug and tow were not to be regarded as a unit though involving the same ownership; and no individual thereof is to be condemned without an active participation in the fault producing the collision. It is not enough that they simply are innocent instrumentalities in the voyage, but each vessel must be an offending thing in order to contribute toward the damage irrespective of ownership.

In the case of Thompson Towing & Wrecking Association v. McGregor, 207 Fed. Rep., 209, referred to at the bottom of p. 2 of petitioner's brief, the decision was rendered August 4, 1913, and in the Moran case the decision was rendered in 1918. No reference is made in the Thompson Towing & Wrecking Association v. McGregor to the opinion of this Court in the case of the Moran.

In the case of the Ship Owners & Merchant Tugboat Company v. Hammond Lumber Company, 218 Fed. Rep., p. 161, decision of the Circuit Court of Appeals, Ninth Circuit, cited in Pe-

itioner's brief, top of p. 6, no reference is made to the Moran decision.

In the case of the Captain Jack, 169 Fed. Rep., p. 455, District of Connecticut, Platt, J., the decision was rendered about the time of the decision in the Moran case. In the case of the Captain Jack a band upon the end of a boom attached to a lighter parted, producing the injuries for which a libel was filed. Steam was supplied at the time by the steamtug alongside of her.

We believe an interpretation of the statute relative to ship owners' liability which necessitates the surrender of a vessel in the tow not participating in the navigation, a mere innocent instrumentality, by reason of the same ownership as the offending vessel which brings about the collision, was not contemplated by the framers of the statute and is not embraced either in the letter or spirit of the statute, and is contrary to the legal relationships of a tug and her tow established by this Court in the case of the *Eugene F. Moran*, *supra*, and that only the tug "Intrepid", which was the offending thing should be surrendered by the owner.

II.

It is respectfully submitted that the petition for writ of certiorari should be denied.

SAMUEL PARK,
HENRY E. MATTISON,
Counsel.

**LIVERPOOL, BRAZIL & RIVER PLATE STEAM
NAVIGATION COMPANY v. BROOKLYN EAST-
ERN DISTRICT TERMINAL.**

**CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT.**

No. 81. Argued November 14, 1919.—Decided December 8, 1919.

A steam tug, propelling, lashed to its sides, other vessels of the same owner, in pursuit of the owner's business, brought one of them—a float carrying the cargo—in collision with libellant's vessel. *Held*, that under Rev. Stats., §§ 4283-4285, the value of the tug, and not the value of the flotilla, was the limit of their owner's liability. P. 51. 250 Fed. Rep. 1021, affirmed.

THE case is stated in the opinion.

Mr. Van Vechten Veeder, with whom Mr. Charles C. Burlingham was on the brief, for petitioner:

The two tugs and the car float, physically united in the performance, through the servants of a common owner, of a common adventure, constitute in reality but a single instrumentality and must all be surrendered as a condition to the limitation of the owner's liability. *The Main v. Williams*, 152 U. S. 122, 131. It would seem to be too obvious for argument that the car float must be surrendered. Apart from the fact that she was the vessel which actually did the damage, she was the instrumentality by which the respondent undertook to perform the service for which it was paid. It surely can make no difference in principle, for the purposes of the limitation statute, whether cargo is carried in the hold of the same vessel which contains the motive power of transportation, or whether, as in this case, the motive power is in one vessel and the cargo is towed in another. In both cases the motive power and the hold are necessary instruments of the transportation. So the tug, which was without steam and was joined to the flotilla for the convenience of the respondent, was, like the car float, also instrumental in causing the collision, inasmuch as her presence as part of the floating unit increased to that extent the difficulty of navigating the flotilla, and added to that extent to its momentum in the negligent course which brought about the disaster. *Thompson Towing & Wrecking Assn. v. McGregor*, 207 Fed. Rep. 209; *The Columbia*, 73 Fed. Rep. 226; s. c., 90 Fed. Rep. 295; *The San Rafael*, 141 Fed. Rep. 270; *Shipowners' & Merchants' Tugboat Co. v. Hammond Lumber Co.*, 218 Fed. Rep. 161; *The Bordentown*, 40 Fed. Rep. 682, 687; *The Anthracite*, 162 Fed. Rep. 384, 388. *The W. G. Mason*, 142 Fed. Rep. 913, has been a source of much confusion. It is undoubtedly true that the per-

sonal liability of the owner is not a determining factor as to the liability of a vessel *in rem*. We also agree that the fact that the two vessels are to be regarded as one for the purposes of a joint undertaking of their owner may have no bearing upon the question of their respective liabilities *in rem*. But neither of these considerations has any bearing upon the question of what must be surrendered by a respondent as a condition of limiting his liability. There may be no liability whatever *in rem*, and yet the shipowner may be entitled to limit his liability by surrendering the vessel which was concerned in the disaster.

The actual decision in *The W. G. Mason*, *supra*, was simply that while the two tugs were engaged in towing the steamship, they were acting in independent capacities. This is made clear by a later decision of the same court in *The Anthracite*, *supra*.

In *The Transfer No. 21*, 248 Fed. Rep. 459, the same court considered for the first time a state of facts substantially similar to the case at bar, applying the principle underlying the action *in rem* to a limitation proceeding. The result is that in the Second Circuit the owner of two or more vessels engaged for profit in a particular adventure may limit his responsibility for the damage done by them to the value of one. Although the liability is said to be strictly as *in rem*, the result may be, as in the case at bar, that the vessel which physically did the damage is not required to respond either in itself or through its owner; while another vessel, which was not actually in collision at all, is held solely liable for the fault of its navigator. Yet, according to the same court's decision in *The Anthracite*, *supra*, it is sufficient that the navigator of a vessel is actually directing her movements; it is not necessary that he shall be technically master, or, indeed, aboard. But the master of a tug which has a car float, without motive power, lashed by it, is cer-

tainly the only person who has any control over its movements.

In *The Eugene F. Moran*, 212 U. S. 466, this court refused to extend the fiction of the personification of a vessel to the situation where a tow was being navigated by an independent contractor. Where, however, the two vessels, as tug and tow, belong to the same owner, the objection that an application of the fiction would result in the taking of a man's property for the wrong of another does not apply; and there is good reason for holding both his vessels liable for the damage occasioned by the wrongful manner in which he himself manages his own vessels where both are involved in the mismanagement.

Congress intended only to protect an owner from losing all his property in a single disaster. It limited his liability to the property engaged in the adventure in which the disaster occurred. It was clearly not the intention of Congress to single out a particular portion of the property engaged in an adventure and limit the owners' liability to such portion.

Mr. Samuel Park, with whom *Mr. Henry E. Mattison* was on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a libel in admiralty brought by the petitioner against the respondent for a collision with the petitioner's steamship *Vauban* while it was moored at a pier in Brooklyn. The respondent does not deny liability but claims the right to limit it under Rev. Stats., §§ 4283, 4284 and 4285, to the value of the vessel that caused the damage. The moving cause was the respondent's steam tug *Intrepid* which was proceeding up the East River, with a car float loaded with railroad cars lashed to its port side and on its starboard side a disabled tug, both belonging to the

respondent. By a stipulation dated August 3, 1917, it was agreed that the damage sustained was \$28,036.98 with \$5,539.84 interest. The value of the tug Intrepid was found to be \$5,750, and the liability of the respondent was limited by the District Court to that sum with interest. The Circuit Court of Appeals affirmed the decree without an opinion. 250 Fed. Rep. 1021; 162 C. C. A. 664. The case is brought here on the question whether the value of the whole flotilla should not have been included in the decree.

The car float was the vessel that came into contact with the Vauban, but as it was a passive instrument in the hands of the Intrepid that fact does not affect the question of responsibility. *The James Gray v. The John Fraser*, 21 How. 184. *The J. P. Donaldson*, 167 U. S. 599, 603, 604. *The Eugene F. Moran*, 212 U. S. 466, 474, 475. *Union Steamship Co. v. Owners of the "Aracan,"* L. R. 6 P. C. 127. The rule is not changed by the ownership of the vessels. *The John G. Stevens*, 170 U. S. 113, 123. *The W. G. Mason*, 142 Fed. Rep. 913, 917. 212 U. S. 466, 475. L. R. 6 P. C. 127, 133. These cases show that for the purposes of liability the passive instrument of the harm does not become one with the actively responsible vessel by being attached to it. If this were a proceeding *in rem*, it may be assumed that the car float and disabled tug would escape, and none the less that they were lashed to the Intrepid and so were more helplessly under its control than in the ordinary case of a tow.

It is said, however, that when you come to limiting liability the foregoing authorities are not controlling—that the object of the statute is "to limit the liability of vessel owners to their interest in the adventure," *The Main v. Williams*, 152 U. S. 122, 131, and that the same reason that requires the surrender of boats and apparel requires the surrender of the other instrumentalities by means of which the tug was rendering the services for which it

was paid. It can make no difference, it is argued, whether the cargo is carried in the hold of the tug or is towed in another vessel. But that is the question, and it is not answered by putting it. The respondent answers the argument with the suggestion that if sound it applies a different rule in actions *in personam* from that which, as we have said, governs suits *in rem*. Without dwelling upon that, we are of opinion that the statute does not warrant the distinction for which the appellant contends.

The statute follows the lead of European countries, as stated in *The Main v. Williams*, 152 U. S. 122, 126, 127. Whatever may be the doubts as to the original grounds for limiting liability to the ship or with regard to the historic starting point for holding the ship responsible as a moving cause, *The Blackheath*, 195 U. S. 361, 366, 367, it seems a permissible conjecture that both principles, if not rooted in the same conscious thought, at least were influenced by the same semi-conscious attitude of mind. When the continental law came to be followed by Congress, no doubt, alongside of the desire to give our ship-owners a chance to compete with those of Europe, there was in some sense an intent to limit liability to the venture, but such a statement gives little help in deciding where the line of limitation should be drawn. No one, we presume, would contend that other unattached vessels, belonging if you like to the same owner, and coöperating to the same result with the one in fault, would have to be surrendered. *Thompson Towing & Wrecking Assn. v. McGregor*, 207 Fed. Rep. 209, 212-214. *The Sunbeam*, 195 Fed. Rep. 468, 470. *The W. G. Mason*, 142 Fed. Rep. 913, 919. The notion as applicable to a collision case seems to us to be that if you surrender the offending vessel you are free, just as it was said by a judge in the time of Edward III, "If my dog kills your sheep and I freshly after the fact tender you the dog you are without recourse against me." Fitz. Abr., Barre, 290. The words of the

statute are "The liability of the owner of any vessel for any . . . injury by collision . . . shall in no case exceed the amount or value of the interest of such owner in such vessel." The literal meaning of the sentence is reinforced by the words "in no case." For clearly the liability would be made to exceed the interest of the owner "in such vessel" if you said frankly, In some cases we propose to count other vessels in although they are not "such vessel"; and it comes to the same thing when you profess a formal compliance with the words but reach the result by artificially construing "such vessel" to include other vessels if only they are tied to it. Earlier cases in the Second Circuit had disposed of the question there, and those in other circuits for the most part if not wholly are reconcilable with them. We are of opinion that the decision was right. *The Transfer* No. 21, 248 Fed. Rep. 459. *The W. G. Mason*, 142 Fed. Rep. 913. *The Erie Lighter* 108, 250 Fed. Rep. 490, 497, 498. *Van Eyken v. Erie R. Co.*, 117 Fed. Rep. 712, 717.

Decree affirmed.